Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1992

McDERMOTT INTERNATIONAL, INC.,

Petitioner,

vs.

UNDERWRITERS AT LLOYDS SUBSCRIBING TO MEMORANDUM OF INSURANCE NO. 104207, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Whether a judgment denying forever McDermott's constitutionally guaranteed and statutorily confirmed right to trial by jury should be corrected by mandamus, the All Writs Statute or otherwise, when failure to do so would result in no appellate review whatsoever at any time and plaintiff would be permanently denied any further opportunity to assert the right to trial by jury.

II. Whether the district court's unprecedented holding, that the McCarran-Ferguson Act applies " . . . only to interstate commerce, not to foreign commerce" (which has been recognized by the State of Louisiana and the National Association of Insurance Commissioners as " . . . gut[ting] a significant portion of the regulatory framework that has been established to protect insureds in their insurance transactions with alien insurers") should be corrected by mandamus, " . . . a one-time-only device to 'settle new and important problems' that might have otherwise evaded expeditious review."

LIST OF PARTIES

Parties to the proceedings below were the petitioner, McDermott International, Inc. (McDermott);

the respondents, John Richard Ludbrooke Youell, as representative of those Certain Underwriters at Lloyd's, London, subscribing to Memorandum of Insurance No. 104207 (Underwriters);

Orion Insurance Company P.L.C., Skandia U.K. Insurance P.L.C., Yasuda Fire & Marine Insurance Company of Europe Limited, Andrew Weir Insurance Company Limited, Indemnity Marine Insurance Company Limited, Ocean Marine Insurance Company Limited, Commercial Union Assurance Company P.L.C., Yorkshire Insurance Company Limited, Sphere Drake Insurance P.L.C., Dai Tokyo Insurance Company (U.K.) Limited, Minster Insurance Company Limited, Assicurazioni Generali S.P.A., Insurance Company of North America (U.K.) Limited, Threadneedle Insurance Company Limited, Bishopsgate Insurance P.L.C., Atlas Assurance Company Limited, Sovereign S.A.5, Sovereign Marine and General Insurance Company Limited, Tokio Marine and Fire Insurance Company (U.K.) Limited, Taisho Marine and Fire Insurance Company (U.K.) Limited, Storebrand Insurance Company (U.K.) Limited, Atlantic Mutual Insurance Company, Warsaw Insurance Company (U.K.) Limited, Cornhill Insurance P.L.C., Allianz International Insurance Company Limited, Phoenix Assurance Public Limited Company, London & Hull Maritime Insurance Company Limited, English and American Insurance

LIST OF PARTIES – Continued

Company Limited, Switzerland Insurance Company (London) Limited, Nippon Fire and Marine Insurance Company (U.K.) Limited, Fuji Fire and Marine Insurance Company (U.K.) Limited, Sirius Insurance Company (U.K.) Limited, Turegum Insurance Company, and Excess Insurance Company Limited (London Companies);

Maxson Young Associates, Inc. (Maxson Young);

amici curiae, Commissioner of Insurance, State of Louisiana: Honorable James H. "Jim" Brown; and the National Association of Insurance Commissioners.

RULE 28.1 LIST

Subsidiaries, Affiliates and Partnerships of McDermott International, Inc. (Excluding Wholly-Owned Subsidiaries)

Davy McDermott Ltd.
Initec, Astano Y McDermott International Inc., S.A.
Malmac Sdn. Bhd.
McDermott Arabia Company Ltd.
McDermott-ETPM, Inc.
P.T. McDermott Indonesia
McDermott Incorporated
B&W Mexicana, S.A. de C.V.
Babcock & Wilcox Beijing Company, Ltd.
Diamond Power Hubei Company Ltd.
Babcock & Wilcox Gama Kazan Teknolojisi Anonim Sirketi
Thermax Babcock & Wilcox Private Ltd.
Hudson Northern Industries, Inc.
Rotovent S.A. de C.V.
Diamond Power (Australia) Pty. Limited
Halley & Mellowes Pty. Ltd.
Heerema-McDermott (Aust.) Pty. Ltd.
HeereMac
Panama Offshore Chartering Company, Inc.
McDermott (Nigeria) Limited
McDermott Scotland Limited
MMC – McDermott Engineering Sdn. Berhad
P.T. Babcock & Wilcox Indonesia
P.T. Bataves Fabrications
Topside Contractors of Newfoundland, Ltd.
Arabian Petroleum Marine Construction Company
DB/McDermott Company

RULE 28.1 LIST – Continued

Abahsain Hudson Heat Transfer Co. Ltd.
Construcciones Maritimas Mexicanas, S.A. de C.V.
ASEA Babcock PFBC
B&W Fuel Company
B&W Nuclear Service Company
Babcock-Ultrapower Jonesboro
Babcock-Ultrapower West Enfield
Diamond Power Specialty Limited
Espacialidades Termomecanicas S.A. de C.V.
Babcock & Wilcox Services, Inc.
KBW Gasification Systems, Inc.
North American CWF Partnership
Palm Beach Energy Associates
Maine Power Services
PowerSafety International, Inc.
South Point CWF

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, McDermott International, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on 6 January 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit presented for review is reported at 981 F.2d 744,

and is reprinted at Appendix p. A-1, *infra*. The district court's decision is not officially reported, but is published at 1992 WL 37695 and reprinted at Appendix p. A-10, *infra*. The Court of Appeals' disposition on prior appeal is reported at 947 F.2d 1489 (Table). The opinion is reprinted at Appendix p. A-27, *infra*.

JURISDICTION

McDermott International, Inc. filed suit against respondent Underwriters in the Civil District Court for the Parish of Orleans, State of Louisiana, asserting McDermott's $39,247,000.00 claim under an "all risks installation floater" insurance policy issued by Underwriters and delivered to McDermott at its home office in New Orleans, Louisiana. Underwriters removed McDermott's suits to federal district court invoking the Convention on Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 *et seq*. McDermott successfully moved to remand the cases on grounds that the policy's "service of suit" or "forum selection" clause entitled McDermott to choose the forum to resolve disputes regarding the claim. Underwriters appealed the remand and the Court of Appeals, exercising direct appellate jurisdiction, vacated the remand order and returned the case to the district court. The district court then summarily reversed its previous ruling, stayed McDermott's suits and ordered determination of its insurance claim to arbitration.

McDermott sought review of this converse ruling by appeal or, alternatively, writ of mandamus. On 6 January

1993, the panel opinion of the Court of Appeals was filed, denying any review. Petitioner applied for rehearing *en banc*. The court had not, at this writing, issued its disposition of Petitioner's request. The instant Petition for Writ of Certiorari is being filed within 90 days of the date of the Court of Appeals' opinion.

The jurisdiction of this Court to review the judgment of the Court of Appeals for the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Constitutional provisions, statutes, and treaty provisions involved in the present action include: U.S. Const. art. I, § 8, cl. 3; U.S. Const. Amend. 7; the Federal Arbitration Act, 9 U.S.C. §§ 4, 16, 201 *et seq.*; the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*; 28 U.S.C. §§ 16 and 1651; La.Rev.Stat.Ann. 22:2 A(1), 22:507, 22:629 *et seq.*; and Convention on the Recognition and Enforcement of Foreign Arbitral Awards 21 U.S.T. 257, T.I.A.S. No. 6997, 330 U.N.T.A. 38, reprinted following 9 U.S.C.A. § 201 (West 1992).

STATEMENT OF THE CASE

McDermott International, Inc., filed two suits in Civil District Court for the Parish of Orleans, State of Louisiana: one against "Certain Underwriters at Lloyd's London," and one against "Certain Institute of London Underwriters' Companies," all of whom were co-insurers

on an All-Risks Installation Floater Policy issued to McDermott. Underwriters removed the suits to the U.S. District Court for the Eastern District of Louisiana, claiming as the sole basis of federal jurisdiction the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 *et seq.* (hereinafter, the Convention). McDermott successfully moved to remand, on grounds that the "service-of-suit" or "forum selection" clause in the policy waived Underwriters' rights of removal. Underwriters appealed the remand order.

On October 3, 1991, the United States Court of Appeals for the Fifth Circuit reversed the district court and remanded the case for resolution of the ambiguity created in the policy by the presence of both a "service-of-suit" clause and an arbitration clause.

McDermott also filed suit in state court against Maxson Young Associates, Inc., which had been retained by Underwriters as a claims adjuster. McDermott's suit against Maxson Young was not based on the policy issued by Underwriters, but rather upon the conduct of Maxson Young during its adjustment of McDermott's claim. Removed to federal court on diversity grounds, this case was consolidated with the suits filed by McDermott against Underwriters. McDermott properly demanded trial by jury of all its actions.

Both sets of Underwriters filed separate suits against Maxson Young in federal court, based, not on the all risks policy, but upon a claimed breach of the agreement between Maxson Young and Underwriters, to which McDermott was not a party. These suits, too, were consolidated.

After remand to the district court, both sets of Underwriters moved the court, against McDermott's opposition, to compel arbitration. The district court so ordered and stayed all of the cases, including those against Maxson Young. McDermott filed its appeal and alternative petition for writ of mandamus. The Fifth Circuit, after granting expedited consideration, denied jurisdiction of McDermott's appeal and denied McDermott's alternative prayer for a writ of mandamus. A Suggestion for Rehearing *En Banc* was filed; but the Court of Appeals had not acted thereon by the time this Petition for Writ of Certiorari was due to be filed.

STATEMENT OF FACTS

McDermott International, Inc. is the parent company of the Babcock & Wilcox Company, which manufactures, supplies and installs, steam boilers and associated equipment and structures. During 1988 and 1989, Babcock & Wilcox supplied two heat pipe air heater units ("HPAH") to Baltimore Gas & Electric Company's ("BG&E") power plant in Maryland. The HPAH units consisted of an array of pipes, containing a solution comprised of water and a widely used corrosion inhibitor, sodium chromate (the "working fluid"). The working fluid was intended to facilitate the exchange of heat from one end of the pipes to the other, and to prevent corrosion inside the pipes.

McDermott obtained an "All Risks Installation Floater Policy" from Underwriters to cover Babcock & Wilcox's operations, including the HPAH project at the

BG&E plant. In late 1989, during installation, maintenance and/or testing of the HPAH units, the working fluid broke down chemically and became caustic, causing corrosion inside the pipes and failure of the HPAH units. Both units had to be completely replaced. McDermott informed its broker, J.H. Minet (Canada), Inc. on February 21, 1990, of the loss.

Minet notified Underwriters of the claim pursuant to provisions of the policy, following which Underwriters instructed Maxson Young Associates, Inc. ("Maxson Young"), international loss adjusters, to investigate and adjust the claim on Underwriters' behalf. McDermott fully cooperated with all requests made to it by Maxson Young. In a meeting held in New Orleans, Louisiana, on August 31, 1990, Maxson Young promised McDermott that Underwriters would pay the claim. Underwriters have, however, refused to honor their representative's promise of coverage, and instead have attempted to avoid or delay payment by demanding arbitration.

The All-Risks Installation Floater Policy that is the basis for this suit contained both a "service of suit" clause and an arbitration clause. The respective clauses state:

* * *

8. *Service of Suit Clause*

> It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the Assured will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and

> practice of such Court. . . . Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.

9. *Arbitration*

> All difference arising out of this contract shall be referred to the decision of any arbitrator to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, one to be appointed in writing by each of the parties and in case of disagreement between the two arbitrators to the decision of any umpire to be appointed in writing by the arbitrators or by a court of competent jurisdiction within the limits of the United States of America. It is agreed that the place of arbitration shall be designated by the Assured and the expenses in connection with the arbitration shall be borne equally between the parties in difference.

* * *

J.H. Minet & Co., Limited, a Lloyd's broker, obtained the policy on behalf of McDermott from Underwriters and it was delivered to McDermott at its corporate headquarters in New Orleans. McDermott's decisions concerning the placing of the policy, and the making of claims were made by its executives in New Orleans.

No one representing McDermott or the Underwriters knows how or why the arbitration clause first appeared in the policy. The parties have agreed only that the arbitration clause was requested by neither of them, and its appearance is a surprise to Underwriters. The district court had found the insurance policy's service of suit clause unambiguously waived Underwriters' rights to removal when it initially remanded the suits to state

court. The Court of Appeals, in reversing the remand order, held that the inclusion of both a service of suit clause and an arbitration clause in the same policy is ambiguous.[1] The Court of Appeals hypothesized a number of possible alternative interpretations[2] and remanded the case to the district court for resolution of the ambiguity. Despite this, the district court again interpreted the contract as unambiguous, but with the arbitration clause paramount, refused to submit the disputed fact of whether the parties agreed to arbitrate to a jury, and ordered McDermott's claims against Underwriters to arbitration. Therefore, the central disputed factual question – the parties' intent in executing a contract with conflicting "service of suit" and arbitration clauses and correlatively whether there was a valid agreement to submit disputed claims to arbitration – has not been and must be determined by a jury.

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[1] "Underwriters and McDermott executed an ambiguous contract. . . . " *McDermott Int'l, Inc. v. Lloyd's Underwriters of London*, 944 F.2d 1199, 1209 (5th Cir. 1991); Appendix p. A-51.

[2] "We recognize two alternate readings of the Policy's service-of-suit and arbitration clauses." *Id.* at 1204, Appendix p. A-39; " . . . 'failure to pay a claim' provision could be interpreted . . . " *Id.* at 1205, A-40; "It is just as likely that the parties did not provide . . . " *Id.* at 1205, A-41; "Thus, the policy *may* read . . . " *Id.* at 1205, A-41; "Underwriters thus possibly understood . . . " *Id.* at 1205, A-41; "The existence of these possible policy interpretations . . . " *Id.* at 1206, A-42; "The existence of alternate possible meanings . . . " *Id.* at 1207, A-45.

REASONS FOR GRANTING THE WRIT

I. *BEACON THEATERS V. WESTOVER*[3] REQUIRES MANDAMUS REVIEW OF THE DENIAL OF MCDERMOTT'S RIGHT TO JURY TRIAL OF THE SUBSTANTIAL AND GENUINE FACTUAL DISPUTE, VIZ., WHETHER AN ENFORCEABLE AGREEMENT TO ARBITRATE WAS MADE.

This Honorable Court, in *Beacon Theaters v. Westover*, 359 U.S. 500 (1959), reversed the appellate court's refusal to issue a writ of mandamus to review the denial of a jury trial in a declaratory action, holding:

> Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with utmost care. *Dimick v. Schiedt*, 293 U.S. 474, 486, 55 S.Ct. 296, 301, 79 L.Ed. 603 (1935).

Id. at 501. The courts below in the present case have done precisely what *Beacon Theaters* reversed, but in a context and with consequences that would appall even the dissenters in that case. McDermott has not been merely *delayed* in access to its constitutionally guaranteed and statutorily confirmed (9 U.S.C. § 4) right to trial by jury.[4] Rather, McDermott has been *forever denied* its right to trial

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[3] 359 U.S. 500 (1959).

[4] McDermott's suit against Maxson Young, not based upon the policy and undisputably not subject to arbitration, is being delayed indefinitely and prejudicially while Underwriters attempt to manipulate resolution of McDermott's claim. Thus, McDermott's case is, in part, identical to *Beacon Theaters*, and mandamus review by the Fifth Circuit was certainly required.

by jury of the factual dispute between the parties regarding their intent in confecting an ambiguous policy with conflicting arbitration and "service of suit" clauses.

> "There can be no doubt that a litigant is entitled to a writ of mandamus to protect a clear constitutional or statutory right to a jury trial."

Beacon Theaters, at 511 (dissent of Justices Stewart, Harlan, and Whittaker). Moreover, unless review is mandated now, the issue can *never* be tried or reviewed.

A. MCDERMOTT'S RIGHT TO A JURY TRIAL IS GUARANTEED BY THE CONSTITUTION, CONFIRMED BY THE IMPLEMENTING PROVISIONS OF THE CONVENTION ON RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, THE FEDERAL ARBITRATION ACT, 9 U.S.C. § 4, AND FUNDAMENTAL PRECEPTS OF THE LAW OF CONTRACTS.

A Motion to Compel Arbitration, opposed because no such agreement had been validly made involves the same standards of due process as a Motion for Summary Judgment. All reasonable doubts and inferences must be resolved in favor of jury trial, as demanded here.[5] It has been held:

> This standard is quickly recognized as the standard used by district courts in resolving summary judgment motions pursuant to Fed.R.Civ.P. 56(c). (Citation omitted.) Application of that standard to the issue presented

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[5] *Par-Knit Mills v. Stockbridge Fabrics*, 636 F.2d 51, 54 (3rd Cir. 1980).

> herein is appropriate inasmuch as the district court's order to arbitrate is in effect a summary disposition of the issue of whether or not there had been a meeting of the minds on the agreement to arbitrate.[6]

The Fifth Circuit held that, "Underwriters and McDermott executed an ambiguous contract."[7] The Court of Appeals then "reversed and remanded," rather than "rendering" judgment on the ambiguity, plainly indicating that the district court was to undertake a full and proper inquiry, i.e. trial, into the parties' intent to resolve this issue. It is well settled that, "Because of this ambiguity, extrinsic evidence bearing on the intentions of the parties must be examined." *Garza v. Marine Transp. Lines, Inc.*, 861 F.2d 23, 28 (2d Cir. 1988). McDermott submitted compelling extrinsic evidence in the district court, requiring resolution by a jury. No other evidence was presented by any party.

The affidavit of J. Burns Smith, McDermott's Corporate Risk Manager, states unequivocally that it was never McDermott's intention that the arbitration clause preclude state court litigation of Underwriters' failure to pay

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[6] *Id.* at 54, fn. 9. Seen in this light, the order compelling arbitration should also be considered a final order, appealable under 28 U.S.C. § 16(a)(3). Underwriters removed McDermott's suits *solely* under the Convention, 9 U.S.C. § 201 *et seq*. Thus, the only issue before the district court was arbitrability, upon which the district court rendered judgment. While McDermott contends that mandamus is the more appropriate vehicle to remedy denial of jury trial, it does not waive, but expressly asserts that it should, alternatively, be entitled to direct appellate review of the district court's decision.

[7] Note 1, *supra*; Appendix p. A-51.

a claim. Although Underwriters argue their intent was to arbitrate, their representatives testified to the contrary. McDermott also submitted by deposition the testimony of Underwriters' representatives, James Teff and William Maitland.

Teff, Claims Director for Jansen Green (the Lloyd's Syndicate representing Underwriters in this case), testified that he had never seen "a service-of-suit clause coupled with an arbitration clause in a property-type policy such as an installation builder's risk floater." Maitland, who handled McDermott's account for Jansen Green in the 1960's and 1970's, testified that he had no recollection of either McDermott or its broker ever requesting the inclusion of the arbitration clause in the policy and that he would have been surprised had such a request been made.

This testimony of the lead Underwriters' representatives, taken in conjunction with that of J. Burns Smith, shows that neither party actually agreed or intended that the arbitration clause even appear in the policy, let alone that such an aberration would nullify the parties' express and certain agreement to the policy's service of suit clause.

It is axiomatic that a jury should have been empaneled to determine the factual question of the parties' intent regarding the forum for litigation of the coverage question. The Fifth Circuit, in the present case, ignored its own unequivocal statement of "black letter" law:

> Should an ambiguity exist, the intent of the parties is a question of fact to be decided by the

> jury. *Freeman v. Continental Gin Company*, 381 F.2d 459 (5th Cir. 1967). If resolution of the legal issue as to the meaning of a contract revolves on the determination of factual questions, as it frequently does, the trier of fact must first decide those questions. . . . *Cook Industries, Inc. v. Community Grain, Inc.*, 614 F.2d 978 (5th Cir.), *cert. denied*, 449 U.S. 952, 101 S.Ct. 356, 66 L.Ed.2d 216 (1980).[8]

The law, contravened by the courts below, is well settled in other circuits. In *AGFA-Gevaert v. A.B. Dick Company*,[9] the Seventh Circuit said:

> . . . extrinsic evidence may be introduced not only if the written contract is ambiguous on its face, but also to show that it is ambiguous . . . [t]his evolution of substantive law parallels that on the procedural side, the upshot being that the jury decides the meaning of the contract in all cases in which the meaning has for any reason been fairly drawn into doubt. . . . [10]

In *Federal Deposit Insurance Corporation v. W.R. Grace & Co.*,[11] the same Court held:

> . . . it is the jury that interprets contracts when interpretation requires consideration of extrinsic evidence."[12]

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[8] *Christopher v. Safeway Stores, Inc.*, 644 F.2d 467, 471 (5th Cir. 1981); see also, *Cunningham & Co. v. Consolidated Realty Management*, 803 F.2d 840 (5th Cir. 1986); *Hoover Inc. v. McCullough Industries, Inc.*, 380 F.2d 798 (5th Cir. 1967).

[9] 879 F.2d 1518 (7th Cir. 1989).

[10] *Id.* at 1521.

[11] 877 F.2d 614 (7th Cir. 1989).

[12] *Id.* at 621. See also, Restatement 2d, Contracts, § 212 (1981).

The district court herein was not empowered to determine the intent of the parties or to resolve the acknowledged ambiguity in the Policy. Jury trial was clearly required, but nonetheless was summarily denied without review by the courts below, in contravention of McDermott's constitutional and statutory due process rights.

Moreover, the Federal Arbitration Act, 9 U.S.C. § 4, mandates that, "If the making of the arbitration agreement or the failure, neglect or refusal to perform the same be in issue," the court shall proceed to try the issue; furthermore, if the party alleged to be in default of an agreement to arbitrate demands a jury, "the court shall make an order referring the issue or issues to a jury. . . . "[13] This right, as declared by the Seventh Amendment to the Constitution and as confirmed by a statute of the United States, "shall be preserved . . . inviolate." Fed.R.Civ.P. 38(a). Neither the district court in the first instance, nor the Court of Appeals, by refusing to correct the district court's error, had discretion to deprive McDermott of its right to jury trial. The Court of Appeals, therefore, erred when it failed to grant appellate or mandamus review to require the district court to submit the genuine factual dispute presented by the policy's ambiguity to a jury.

This Honorable Court provided clear guidance on the determination of the making of an arbitration agreement as an initial inquiry:

> Under our decision, whether or not the company was bound to arbitrate, as well as what

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[13] 9 U.S.C. § 4 is applicable to the Convention on the Recognition of Foreign Arbitral Awards, 9 U.S.C. § 208.

> issues it must arbitrate, is a matter to be determined by the Court [finder of fact] on the basis of the contract entered into by the parties.[14]

The Court of Appeals recognized that the arbitration clause presented in the case at bar, is not to be read without consideration of the other terms and conditions of the policy, and held that the contract was ambiguous.[15] Thus, the district court was required to submit the issue of whether or not an agreement was made to a jury, *first*. But the courts below ignored this Honorable Court's and the statute's instructions and by-passed this initial inquiry.

Other circuits have recognized this Court's rule in interpreting § 4 of the Federal Arbitration Act, and have insisted that district courts adhere to its requirements for determination of whether a valid arbitration agreement was or was not made between the parties.

In *I.S. Joseph Co., Inc. v. Michigan Sugar Co.*,[16] the U.S. Court of Appeals for the Eighth Circuit held:

> The phrase "the making of the agreement for arbitration"[17] is the essence of the District Court's [fact finder's] inquiry under § 4. It includes *both* a determination of whether the subject matter of the dispute is comprehended within the agreement . . . and whether there is

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[14] *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, 241, 82 S.Ct. 1318, 1320 (1962).

[15] See notes 1 and 2, *supra*.

[16] 803 F.2d 396 (8th Cir. 1986).

[17] Quoting the Federal Arbitration Act, 9 U.S.C. § 4.

> an agreement between the parties at all (citation omitted).[18]

The court went on to explain:

> Nevertheless any power that the arbitrator has to resolve the dispute must find its source in a real agreement between the parties. He has no independent source of jurisdiction apart from the consent of the parties. If there is in fact a dispute as to whether an agreement to arbitrate exists, then that issue must first be determined by the Court [fact finder] as a prerequisite to the arbitrator's taking jurisdiction (citation omitted).[19]

In *Tehran-Berkeley Civ. & Env. Eng. v. Tippetts-Abbett*,[20] the Second Circuit concluded that the District Court had erred in dismissing a petition to arbitrate without holding an evidentiary hearing. Even if the district court had determined that the arbitration provision covered the claims being made, the Second Circuit held that the court must address whether, as defined under the Federal Arbitration Act, "the making of the arbitration agreement" was a genuine issue in dispute and, if it was, hold an evidentiary hearing on this question prior to ordering arbitration. *Id.* at 868.

The Ninth Circuit held that, when evaluating a motion to compel arbitration, the fact finder must first determine whether the parties intended to opt for arbitration. *Britton v. Co-Op Banking Group*, 916 F.2d 1405, 1413, fn. 9 (9th Cir. 1990). Citing its earlier holding in *Van Ness*

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[18] 803 F.2d at 399.

[19] *Id.*

[20] 816 F.2d 864 (2d Cir. 1987).

Townhouses,[21] the court said, "When we are asked to compel arbitration of a dispute, our threshold inquiry is whether the parties agreed to arbitrate."[22] In *Britton*, the Ninth Circuit sharply criticized the district court for not resolving this threshold question of fact. *Id.* at 1413.

B. THE DENIAL OF MCDERMOTT'S RIGHTS TO TRIAL BY JURY TO DETERMINE IF AN AGREEMENT TO ARBITRATE WAS MADE CANNOT BE REVIEWED OR CORRECTED AFTER ARBITRATION; THEY WILL BE FOREVER LOST IF REVIEW IS NOT GRANTED NOW.

Without appellate review now, McDermott will permanently lose its right to jury trial on this issue, even under 9 U.S.C. § 4, since this right is available only "on or before the return day of the Notice of Application" for an order directing arbitration. There will be no such application by Underwriters *after* arbitration. The arbitral tribunal cannot review its own authority to arbitrate, for it must presume an agreement to arbitrate before it can undertake any inquiry.[23] The initial propriety of submission to arbitration, distinguished from the scope of

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[21] *Van Ness Townhouses v. Mar Industries Corp.*, 862 F.2d 754 (9th Cir. 1989).

[22] *Id.* at 756.

[23] The district court's ruling below (Appendix p. A-10) is a model of an arbiter's initial resolution of questions regarding the *scope* of his authority under a broad agreement already established. The arbiter, of course, has no choice but to presume the initial agreement. The district court, however, had no choice under the law, but to submit a genuine dispute over the making of an agreement to arbitrate to a jury.

submission, is not an issue in an action to enforce an award. The Convention and Federal Arbitration Act[24] contemplate that litigants are entitled to a trial on the issue of whether they agreed to submit to arbitration *before* they are forced to do so. The courts below have turned this statutory scheme on its head. The fiction presented by the courts below, that all such issues can be effectively reviewed after arbitration, is equivalent to reviewing an order of execution (without trial) after the accused has been buried.

Second, McDermott will be deprived of its express contractual rights, under the service-of-suit clause of the policy, to assert claims in and require Underwriters to submit to Louisiana courts. Third, compelling arbitration at this time will preclude speedy resolution of grievances, including claims involving Maxson Young which are not subject to any alleged agreement to arbitrate. The parties' claims against Maxson Young, not based upon the insurance policy, grow stale while Underwriters seek means to avoid being subjected to Louisiana law. Justice delayed is, in this case, justice denied. Thus, the district court's failure to submit the dispute to a jury will, without action by a higher court, be as final as a lethal injection to McDermott's rights herein – and with no trial or appellate review.

The majority rule of *Beacon Theaters* required mandamus review where a district court delayed a party's access to jury trial. The dissenting justices harbored ". . . no doubt that a litigant is entitled to a writ of mandamus to protect a clear constitutional or statutory

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[24] Convention Arts. II and V; 9 U.S.C. § 4.

right to a jury trial . . . ," but thought more than delay was required. *Beacon Theaters*, at 511 (dissent). Had the *Beacon Theaters* Court been presented with McDermott's case, it is reasonable to suggest, the decision would have been unanimous, forcefully requiring issuance of a writ of mandamus to review the district court's complete denial of McDermott's right to trial by jury.

C. REVIEW BY MANDAMUS OR OTHERWISE OF THE DENIAL OF JURY TRIAL BY THE COURTS BELOW, MUST ALSO PRESERVE THE THRESHOLD INQUIRY UNDER THE CONVENTION, WHETHER THE ALLEGED ARBITRATION AGREEMENT IS VALID OR ENFORCEABLE UNDER APPLICABLE LAW, INCLUDING THE IMPACT OF THE MCCARRAN-FERGUSON ACT, AS A PREREQUISITE TO SUBMITTING SUCH DISPUTED AGREEMENT TO A JURY.

Whether or not the district court's refusal to apply McCarran-Ferguson to sustain the anti-arbitration provisions of Louisiana's Insurance Code merits mandamus review standing alone,

> "There can be no doubt that a litigant is entitled to [review of McCarran-Ferguson's impact upon the threshold question of enforceability of an alleged arbitration agreement under Articles II and V of the Convention, which is a necessary prerequisite to exercise of a right to jury trial on the disputed arbitration agreement on] a writ of mandamus to protect a clear constitutional or statutory right to a jury trial."

While some license has been taken with the foregoing quotation from *Beacon Theaters* (at p. 511 (dissent)), it requires no extension of this Court's rule to require that

the mandamus review invoked to protect a party's right to jury trial also address those issues, necessarily and by rule of law, precedent to exercise of the protected right.

The highest court in New York recently addressed the question presented by McDermott here. In *Corcoran v. Ardra Ins. Co.*, 77 N.Y. 2d 225, 231-32, 566 N.Y. S. 2d 575, 578 (N.Y. 1990), *cert. denied sub nom, Ardra Ins. Co. v. Curiale*, 111 S.Ct. 2260 (1991), the Court detailed the threshold analysis required by the Convention, finding that the treaty's own internal exceptions expressly reverted the matter to New York law.[25] Specifically, the Court held:

> Nevertheless, it is apparent that the drafters [of the Convention] did not intend to compel arbitration in all cases involving international commercial disputes because the Convention excepts certain contracts from its terms. As Secretary of State Katzenbach noted in recommending accession to President Johnson and the Senate, these exceptions "provide substantial safeguards to American citizens against any misuse of the arbitration process" (Senate Doc E, 90th Cong. 2d Sess., at 4 [1968]).
>
> The exceptions relevant to this case are found in Article II of the Convention. They require recognition of an arbitral agreement

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[25] The law at issue gave the New York Supreme Court exclusive jurisdiction over insurer liquidation proceedings. New York courts thus hold that arbitration agreements are invalid *because they deprive the State Supreme Court of jurisdiction*. Louisiana courts hold that La.Rev.Stat. 22:629 means arbitration agreements are invalid because they deprive Louisiana's courts of jurisdiction. cf. *West of England Ship Owners Mut. v. American Marine*, 981 F.2d 749, 750 n.5 (5th Cir. 1993).

> only when it "concern[s] a subject matter capable of settlement by arbitration" and provide that the court of an acceding nation may refuse to refer disputing parties to arbitration if the international agreement "is null and void, inoperative or incapable of being performed." [citation omitted]. These exceptions are implemented by examining the domestic law of an acceding nation. [citations omitted]. In the United States, statutes provide that insurance is generally a matter of State concern and that the laws of the individual States govern (McCarran-Ferguson Act, 15 U.S.C. §§ 1011, 1012(b); *see also*, Bankruptcy Code, 11 U.S.C. § 109[b][2] [which exempts insurance companies from its provisions]). Thus, in this case, the law to be applied in interpreting the exceptions is Article 74 of the New York Insurance Law.

Id.

The New York high court then held that the parallel provisions in Articles II and V of the Convention avoided arbitration, because New York law would not enforce it. The court recognized that state insurance law, backed by the full force of Congress' constitutional Commerce Clause power, must prime mere policy concerns of "international comity" and general preferences for enforcement of arbitration agreements. *Id.* at 233. Because federal law, as expressed in McCarran-Ferguson, protects state insurance laws from federal intrusion, and since Louisiana public policy, expressed in its Insurance Code, La.R.S. 22:2 A(1), 22:507, and 22:629, invalidates compulsory arbitration agreements in insurance contracts, Articles II and V of the Convention should prohibit any initial finding of an enforceable agreement to arbitrate in this case.

A scholarly, though unreported federal district court opinion from New York, *Ideal Mut. Ins. Co. v. Phoenix Greek General Ins. Co.*, 1987 WL 28636 (S.D.N.Y. 1987), had previously held that:

> The fact that the arbitration agreement at bar and the parties to them fall within the parameters of the Convention on the Recognition and Enforcement of Foreign Arbitral awards, 9 U.S.C. § 206, does not alter that result. The McCarran-Ferguson Act, itself a declaration of Congressional policy, is cast in broad terms. . . . McCarran-Ferguson applies with full force and effect. That conclusion is reinforced by Article V of the Convention, which denies recognition or enforcement of foreign arbitration awards if "contrary to the public policy" of the country where recognition or enforcement is sought. McCarran-Ferguson states a clear Congressional mandate "that regulation of the insurance industry be left to the individual states."

Id. at 1, 2. Neither the district court or the Court of Appeals in this case could cite authority for enforcement of arbitration under the Convention in the face of a state law both *specifically regulating insurance* and disallowing arbitration.[26] The district court skipped over this essential inquiry, as it did the requirement of jury trial on the

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[26] No case cited by the district court in its decision addressed *insurance* statutes that prohibit arbitration. The cases cited are: *Sedco v. PEMEX*, 767 F.2d 1140 (5th Cir. 1985); *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852 (1984); *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth*, 105 S.Ct. 3346 (1985). These cases address the general policy of enforcing arbitration agreements over general state anti-arbitration statutes, not specific insurance regulatory law empowered by McCarran-Ferguson.

disputed making of the alleged agreement to arbitrate, erroneously relying upon jurisprudence addressing only the *scope* of an agreement, *not its validity* at the outset. Such judicial repeal, not only of federal and state statutes (e.g., 9 U.S.C. § 4, La.R.S. 22:629), but also provisions of a treaty and the United States Constitution, clearly exceed the district court's authority and require correction by mandamus. Even if the refusal of the courts below to apply the McCarran-Ferguson Act to sustain Louisiana's statutory preclusion of compulsory arbitration agreements in insurance policies delivered within the state were not, in itself, an error of sufficient magnitude to require mandamus review, the impact of McCarran-Ferguson must, nonetheless, be considered as it relates to the initial choice of law or "enforceability" determination that must be made by district courts before the right to jury trial which *Beacon Theaters* so sedulously protects can be exercised.

II. THE FIFTH CIRCUIT'S ACQUIESCENCE IN THE DISTRICT COURT'S HOLDING THAT THE MCCARRAN-FERGUSON ACT DOES NOT APPLY TO "FOREIGN COMMERCE," BUT ONLY TO "INTERSTATE COMMERCE," DIRECTLY CONFLICTS WITH THE EXPRESS TERMS OF THE ACT AND THE COMMERCE CLAUSE OF THE CONSTITUTION, AS WELL AS THE LAW OF THE TENTH CIRCUIT AND EVISCERATES THE ONLY REGULATORY AUTHORITY AVAILABLE TO PROTECT CITIZENS OF THE SEVERAL STATES IN DEALINGS WITH ALIEN INSURERS.

McDermott sought review by writ of mandamus to correct the district court's shocking error in excepting alien underwriters from state insurance regulation under

the McCarran-Ferguson Act. This is plainly an instance in which extraordinary corrective action must be taken. The Fifth Circuit's refusal to take this issue up by writ of mandamus is wholly unsupported. The decisions below present this Honorable Court with a novel legal question on which at least the Fifth and Tenth Circuits are now in conflict and which has far reaching, adverse implications for regulation of the business of insurance in the United States.

The Constitution confers upon Congress the power to regulate commerce "with foreign Nations and among the several States. . . . "[27] Congress returned this power, with respect to insurance, to the states *via* the McCarran-Ferguson Act. The power to regulate commerce by foreign nationals in the United States has never been amputated from Congress' Commerce Clause power. It is well settled, to the contrary, that McCarran-Ferguson "removed *all* Commerce Clause *limitations* on the authority of the states to regulate and tax the business of insurance."[28] The McCarran-Ferguson Act, 15 U.S.C. § 1012(a), clearly states, ". . . the business of insurance, and *every person* engaged therein, shall be subject to the laws of the several States. . . . " This Honorable Court has consistently recognized what Congress explicitly stated in McCarran-Ferguson: ". . . federal laws should not be construed to supercede state laws regulating the business of insurance. [15 U.S.C.] § 1012(b)." *Metro Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 736 (1985).

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[27] U.S. Const. Art. I, § 8, Cl. 3.

[28] *W & S Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 654 (1981) (emphasis added).

The insurance policy, issued by Underwriters for delivery in Louisiana, is subject to the laws of Louisiana. Nonetheless, the district court inexplicably found that McCarran-Ferguson does not apply to foreign commerce, but only to interstate commerce, citing as its sole support, *Triton Lines, Inc. v. Steamship Mut. Underwriters Ass'n*, 707 F.Supp. 277 (S.D. Tex. 1989).

Triton Lines simply does not support the district court's judicial repeal of the Commerce Clause and the McCarran-Ferguson Act *vis a vis* alien underwriters herein. Had Congress intended to limit McCarran-Ferguson to purely domestic commerce and to leave alien insurers *totally* unregulated, it could and would have said so. It has not. Rather, Congress has unwaveringly maintained such regulatory authority in the several states.

In a case on all fours with the issue at bar, *Mutual Reinsurance Bureau v. Great Plains Mut. Ins. Co., Inc.*,[29] the Tenth Circuit found that a Kansas statute prohibiting arbitration agreements in insurance contracts was "a statute regulating 'the business of insurance,' " and that McCarran-Ferguson expressly precludes the application of the Federal Arbitration Act. *Id.* at 932. Thus, the Fifth Circuit is, in permitting the district court's decision herein to stand, in direct conflict with the Tenth Circuit Court of Appeals.

Neither the importance of this issue nor the need for an immediate resolution can be disputed. Both the Louisiana Commissioner of Insurance and the National Association of Insurance Commissioners called, in the

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[29] 969 F.2d 931 (10th Cir.), *cert. den.*, 113 S.Ct. 604 (1992).

strongest terms, for correction of the district court's error. The National Association of Insurance Commissioners, as *amicus curiae,* described the effect of the district court's ruling as ". . . gut[ting] a significant portion of the regulatory framework that has been established to protect insureds in their insurance transactions with alien insurers." The district court's revolutionary decision received widespread attention in the national insurance trade press.[30] One could hardly conceive of a more crucial issue in the insurance industry than such usurpation of regulatory power over the large percentage of the industry involving alien underwriters. This Honorable Court should issue a writ of certiorari to require the courts below to correct their unwarranted attenuation of the states' Commerce Clause power to regulate the business of insurance ". . . *with foreign Nations* and among the several States . . . ," *per* the McCarran-Ferguson Act.

CONCLUSION

> "There can be no doubt that a litigant is entitled to a writ of mandamus to protect a clear constitutional or statutory right to a jury trial."

Beacon Theaters, at 511 (dissent of Justices Stewart, Harlan, and Whittaker). McDermott's right to a jury trial has not merely been delayed, it has been forever denied.

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[30] *National Underwriter,* No. 26 (June 29, 1992): "Federal Judge says McCarran Does Not Apply to Lloyd's"; *Business Insurance* (June 15, 1992): "Louisiana Seeks to Modify Policies Used by Lloyd's." Appendix pp. A-62-66.

*At the minimum, there is a factual dispute surround*ing the presence and meaning of the arbitration clause in the policy. The Fifth Circuit so held in its first review of this matter. It is "black letter" law that "Should an ambiguity exist, the intent of the parties is a question of fact to be decided by the jury."[31]

It is equally well settled that the absence of intent by the parties to resolve their disputes exclusively by arbitration is fatal to the finding of any agreement to arbitrate.

> Though no particular wording is required for an arbitration agreement, the *intent* of the parties that arbitration be the *exclusive* method for the settlement of disputes arising under the contract must be clearly manifested. This express intent by both parties to enter into the arbitration agreement is essential to its existence. It has been held that "[a]n agreement to arbitrate must be clear and direct and must not depend upon implication, inveiglement, or subtlety. . . . It should not depend solely upon the conflicting fine print of commercial forms which cross one another but never meet."[32]

Absent an enforceable agreement to arbitrate, the matter cannot be referred to arbitration.

How, but through serious error, can a single clause, requested by neither party, whose author and origin are

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[31] *Christopher v. Safeway Stores, Inc.*, 644 F.2d 467, 471 (5th Cir. 1981).

[32] Domke Comm. Arbitration § 5:01 (Rev Ed).

unknown, become a clause paramount in an insurance policy, operating to deprive McDermott of its right to jury trial? McDermott cannot lawfully be deprived of a jury trial on this issue – a right § 4 of the Federal Arbitration Act and the Seventh Amendment to the U.S. Constitution guarantee – by either the district court's or the Fifth Circuit's desire to manage its caseload by quickly referring this case to arbitration without due process.

Congress expressly and unequivocally preserved the right to jury determination of factual issues concerning the making of an arbitration agreement. The courts below cannot selectively repeal such laws. Where a court undertakes to do so, and thereby denies a party its right to jury trial issuance of a writ of mandamus is required. No professed favoritism for arbitration can justify the Court of Appeals' inaction. This Court should assert its jurisdiction, reverse the Fifth Circuit's decision, and require the district court to empanel a jury as demanded by McDermott, as guaranteed by the Constitution, and as afforded by 9 U.S.C. § 4.

Neither the district court nor the Court of Appeals in this case could cite authority for enforcement of arbitration under the Convention, without jury trial, in the face of a state law both *specifically regulating insurance* and disallowing arbitration. The Convention, itself, avoids arbitration agreements that are unenforceable under the law of the acceding nation. Such is the case here. Federal law, such as the Convention and its F.A.A. implementation provisions, may generally preempt inconsistent state law, but not in the field of insurance, where McCarran-

Ferguson has conferred upon, in the present case, Louisiana state law, the aegis of the federal Constitution's Commerce Clause power. Thus, not only is a compulsory arbitration clause in an insurance policy against both federal and Louisiana public policy, it is null and void under the law of this nation and may not be enforced, per express terms of the Convention. As noted elsewhere:

> Congress has generally left insurance regulation to the states, and states, in turn, regulate both legislatively and judicially. There is no significant reason to depart from that approach simply because an insurance policy contains an arbitration clause. Furthermore, since most insurance cases are likely to be brought in state court, application of state law would be more efficient and, on the voluntariness issue, would promote respect for the right to a jury trial protected in most state constitutions.[33]

The district court unilaterally carved out an unprecedented exception to McCarran-Ferguson with an erroneous and unsupported distinction between "interstate" and "foreign" commerce, creating uncertainty and inequality in a multi-billion dollar industry. The disruption of over two hundred years of state regulation of insurance, regardless of the vagaries of Underwriters' citizenship, resultant from the Court of Appeals' refusal to review and reverse the district court's decision, cries out for this Honorable Court to issue a writ of certiorari and to mandate that the district court apply, rather than

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[33] Lamson, S., *The Impact of the Federal Arbitration Act and the McCarran-Ferguson Act on Uninsured Motorist Arbitration*, 19 Conn. L.R. 241, 284.

repeal the Constitution and laws of the United States, including the McCarran-Ferguson Act in this case.

Wherefore, petitioner prays that this Honorable Court issue a writ of certiorari to review the decision of the Court of Appeals for the Fifth Circuit herein, and for all other relief to which petitioner may be entitled in the premises.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3622

McDERMOTT INTERNATIONAL, INC.,

Plaintiff-Appellant,

versus

UNDERWRITERS AT LLOYDS SUBSCRIBING TO MEMORANDUM OF INSURANCE NO. 104207,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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Before JONES and BARKSDALE, Circuit Judges, and JUSTICE,[1] District Judge.

BARKSDALE, Circuit Judge:

The determinative starting point for this appeal by McDermott International, Inc., is whether the district court orders compelling arbitration of McDermott's dispute with certain Underwriters at Lloyds and staying litigation pending arbitration are interlocutory, not final. Because we hold that they are the former, and because § 16 of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*,

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[1] District judge for the Eastern District of Texas, sitting by designation.

prohibits appeal from such orders, we DISMISS for lack of jurisdiction. Likewise, we DENY the alternative application for a writ of mandamus.

I.

McDermott, a Panamanian corporation headquartered in Orleans Parish, had an insurance policy with Underwriters that covered the operations of one of McDermott's subsidiaries. The policy required arbitration of "[a]ll differences arising out of this contract". In 1989, the subsidiary's property was damaged; and McDermott submitted a policy claim. Maxson Young Associates, Inc., was retained to adjust the loss. Underwriters denied coverage, and this litigation ensued.

Beginning in late 1990, McDermott filed two actions in Louisiana state court against Underwriters: one for contract damages; the other for a declaratory judgment to block arbitration sought by Underwriters. Invoking the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 *et seq.*, Underwriters removed both actions to federal district court, where they were consolidated.

The district court remanded the cases to state court, holding that a service-of-suit clause in the policy waived Underwriters' removal rights; but this court vacated that order. *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199 (5th Cir. 1991). Three additional actions were consolidated into the action: a state court suit, removed through diversity, by McDermott against the adjuster, Young, alleging that an unauthorized coverage letter contractually obligated Young to pay for the loss;

and two diversity actions by Underwriters against Young, seeking indemnification for any damages awarded McDermott against Underwriters.

Underwriters' motion to compel arbitration and stay litigation pending arbitration was granted in February 1992. The stay extended not only to the parties to the arbitration agreement, but also to those parties and claims not subject to arbitration.

II.

A.

Because this appeal turns on jurisdiction, we do not reach the issues raised by McDermott – essentially, whether compelling arbitration was erroneous. Underwriters contends that we lack jurisdiction, maintaining that appeal from the district court's orders is barred by § 16 of the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq*. That section, 9 U.S.C. § 16, governs appellate jurisdiction over orders affecting arbitration, whether issued under the FAA or the Convention.[2] *See* 9 U.S.C. § 208.

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[2] Section 16 provides:

(a) An appeal may be taken from –

(1) an order –

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

The FAA manifests a "liberal federal policy favoring arbitration". *Gilmer v. Interstate/Johnson Lane Corp.*, ___ U.S. ___, 111 S. Ct. 1647, 1651 (1991) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)). Section 16 promotes this policy "by permitting interlocutory appeals of orders favoring litigation over arbitration and precluding review of interlocutory orders that favor arbitration." *Forsythe Int'l, S.A. v. Gibbs Oil Co. of Texas*, 915 F.2d 1017, 1020 (5th Cir. 1990). It "does not solely favor the arbitration process, [however,] because appeals may still be taken from final judgments concerning

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(D) confirming or denying confirm-action of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order —

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

9 U.S.C. § 16.

arbitration or pursuant to a 28 U.S.C. § 1292(b) certificate." *Turboff v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 867 F.2d 1518, 1520 (5th Cir. 1989); 9 U.S.C. § 16(a)(3)(b).[3]

The orders staying the litigation and compelling arbitration, if interlocutory, clearly fall under § 16(b), which prohibits appeals from orders "granting a stay of any action under section 3 of this title" and "compelling arbitration under section 206 of this title". 9 U.S.C. §§ 16(b)(1) & (b)(3). As noted, if final, § 16(a)(3) allows appeal. Therefore, at issue is whether the orders are interlocutory or final.

An order is considered final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945).[4] In determining whether an order affecting arbitration is final or interlocutory, most courts distinguish between arbitration actions that are "independent" and those that are "embedded" among other claims. Generally, if the only issue before the court is the dispute's arbitrability, the action is considered independent and a court's decision on that issue constitutes a final decision. *See, e.g., Matter of Chung and President Enters. Corp.*, 943

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[3] Permissive § 1292(b) jurisdiction is not before us. The district court declined to so certify this matter.

[4] Because § 16 does not define "interlocutory" and "final", we look for guidance to cases interpreting those terms in the context of 28 U.S.C. § 1291. *See, e.g., Turboff v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 867 F.2d 1518, 1520 (5th Cir. 1989) (relying on the finality determination reached by "a slightly different path" in a pre-§ 16 case, *Jolley v. Paine Webber Jackson & Curtis, Inc.*, 864 F.2d 402 (5th Cir.), *supplemented*, 867 F.2d 891 (5th Cir. 1989)).

F.2d 225, 228 (2d Cir. 1991). If, however, the case includes other claims for relief, an arbitrability ruling does not "end the litigation on the merits", but is considered interlocutory only. *See, e.g., Construction Laborers Pension Trust v. Cen-Vi-Ro Concrete Pipe & Prods. Co., Inc.*, 776 F.2d 1416, 1420 n.5 (9th Cir. 1985); *Wilson Wear, Inc. v. United Merchants & Mfrs., Inc.*, 713 F.2d 324, 326 (7th Cir. 1983); *Langley v. Colonial Leasing Co. of New England*, 707 F.2d 1, 4 (1st Cir. 1983). Although this circuit has never been called upon to apply the distinction, it has acknowledged its existence. *See Jolley v. Paine Webber Jackson & Curtis, Inc.*, 864 F.2d 402, 405 & n.3 (5th Cir.) *supplemented*, 867 F.2d 891 (5th Cir. 1989).

McDermott maintains that the decision was final in its own "judicial context",[5] because the only jurisdictional basis for the original suit's removal to federal court was the question of arbitrability under the Convention. It denies the relevance of both the state law claims raised in the original suit and the other suits that were later consolidated with it. On the other hand, Underwriters asserts that because the arbitrability issue is embedded among other claims, the district court's decision cannot be deemed to have ended the litigation on the merits.

We agree with Underwriters. When the cases were consolidated pursuant to Fed. R. Civ. P. 42(a), they became a single judicial unit, as described in *Road Sprinkler Fitters Local Union v. Continental Sprinkler Co.*, 967 F.2d

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[5] In support of its argument, McDermott quotes Siegel, *Appeals from Arbitrability Determinations Under the New § 15 of the U.S. Arbitration Act*, 126 F.R.D. 589, 591 (1989). (Section 16 was formerly 15.)

145, 151 (5th Cir. 1992). The consolidation orders broadly indicated that the cases were being consolidated "for disposition" because they grew out of the same factual situation. As in *Road Sprinkler*, "[t]here is no indication that the district court consolidated the cases only for limited purposes." *Id.* Furthermore, at least some of the suits could have been brought as a single action originally, and all are "based largely on the same operative facts." *See id.*

Because the interpretation urged by McDermott ignores the broad scope of the consolidation orders, we hold that the finality of the arbitration decision depends upon the present posture of the case, not on the narrow context in which the arbitrability question first arose. *Accord, Middleby Corp. v. Hussman Corp.*, 962 F.2d 614, 615 (7th Cir. 1992) (stating that where two suits were consolidated for all purposes under Fed. R. Civ. P. 42(a), only a "final decision on the full proceeding" is considered final under 28 U.S.C. § 1291). Therefore, we do not address whether the orders would have been considered final absent the consolidation.

Fifth Circuit precedent firmly establishes that, in pending, nonindependent suits, an order compelling arbitration accompanied by a stay of the proceedings pending arbitration is not a final decision for purposes of § 16(a)(3). *See Turboff*, 867 F.2d at 1520-21; *Purdy v. Monex Int'l, Ltd.*, 867 F.2d 1521, 1523 (5th Cir.), *cert. denied*, 493 U.S. 863 (1989). Although presently stayed, the indemnification claims between Underwriters and Young remain pending before the district court, and will have to be addressed following arbitration. And, McDermott's claim

against Young, based on the alleged unauthorized coverage letter, also awaits resolution. ,Additionally, further proceedings between McDermott and Underwriters will be required not only to confirm an arbitral award, but also to determine the effect of arbitration on McDermott's original contract claims against Underwriters. *See Jolley*, 864 F.2d at 405. With these matters still pending, the district court's orders clearly did not "end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment." *Catlin*, 324 U.S. at 233.

Because the district court's orders were interlocutory, not final, appeal is barred by § 16(b).

2.

Alternatively, McDermott urges us to review the orders under an application for a writ of mandamus.[6] This court has recognized that such review may be available. *See Turboff*, 867 F.2d at 1520 n.5. But, needless to say, the writ is an extraordinary remedy, reserved for extraordinary situations. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988). Traditionally, federal courts have exercised their mandamus power only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Id.* at 289 (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)). The party

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[6] A separate petition for the writ (No. 92-3621) was denied by a motions panel of this court on July 28, 1992. That panel noted, however, that the alternative request for mandamus contained in McDermott's appellate brief would be considered with the appeal. We now consider that request.

seeking mandamus has the burden of demonstrating a "clear and indisputable" right to it. *See Gulfstream*, 485 U.S. at 289 (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953)). Here, that burden is particularly heavy, because Congress has expressly limited interlocutory review of a district court decision on arbitration.

McDermott has failed to satisfy this most demanding standard. The district court did not clearly overstep its authority when it granted the order compelling arbitration and stayed further proceedings pending that arbitration. Moreover, it is more than well settled that a writ of mandamus is not to be used as a substitute for appeal, *see In re Cajun Elec. Power Co-Op., Inc.*, 791 F.2d 353, 365-66 (5th Cir. 1986); and we see no reason why all issues presented in this appeal cannot be raised in an appeal after the arbitration is completed and a final judgment entered.

III.

Congress has forbidden the appeal of interlocutory orders favoring arbitration, intending that the parties first submit to arbitration. Accordingly, this appeal is DISMISSED and the application for a writ of mandamus DENIED.

MINUTE ENTRY
McNAMARA, J.
FEBRUARY 14, 1992

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

McDERMOTT INTERNATIONAL, INC.	*	CIVIL ACTION
	*	NO. 91-841 AND
VERSUS	*	CONSOLIDATED CASES
UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING TO MEMORANDUM OF INSURANCE NO. 104207	*	SECTION "D" (5)

Before the court are the following Motions:

1. Motion of Defendant John Richard Ludbrooke Youell, as representative of those certain Underwriters at Lloyd's, London, subscribing to Memorandum of Insurance No. 104207 ("Underwriters"), to Compel Arbitration and to Stay Litigation;

2. Motion of Plaintiff, McDermott International, Inc. ("McDermott"), for Summary Judgment; and

3. Motion of McDermott to Remand

Plaintiff, McDermott, has filed opposition to Underwriters' Motion to Compel Arbitration and to Stay Litigation. Defendants, Underwriters, have filed opposition to McDermott's Motion for Summary Judgment and Motion to Remand. These Motions are before the court on briefs, without oral argument.

BACKGROUND

This suit arises from a dispute over coverage of an "All Risks" Installation Floater insurance policy, No. 552/832127500, ("the policy"), issued in 1989 by Underwriters to McDermott. McDermott made a claim for losses under this policy for repair or replacement of two heat pipe air heaters supplied to Baltimore Gas & Electric Company by McDermott's subsidiary, the Babcock and Wilcox Company.[1] Underwriters have denied McDermott's claim.

On November 15, 1990, McDermott filed suit no. 90-22157 against Underwriters in Civil District Court, Orleans Parish, seeking a money judgment for sums allegedly due under the policy. On January 29, 1991, McDermott filed a First Amended and Supplemental Petition in 90-22157, and for the first time served Underwriters with the suit. On January 30, 1991, Underwriters demanded arbitration of the coverage and damage issues. On February 8, 1991, McDermott filed suit no. 91-2894 against Underwriters in Civil District Court, Orleans Parish, seeking declaratory judgment on the issue of arbitration. Underwriters removed both state court suits to this court pursuant to the Convention Act, 9 U.S.C. § 205 ("the Convention").[2] This court remanded the cases to Civil District Court. The Fifth Circuit vacated the remand order

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[1] Underwriters' Memorandum in Support of its Motion to Compel Arbitration and to Stay Litigation, at p.2-3; McDermott's Memorandum in Opposition to Defendant's Motion to Compel Arbitration and Stay Litigation, at p. 1-3.

[2] State Court suit no. 90-22157 became USDC no. 91-841, and State Court suit no. 91-2804 became USDC no. 91-871.

in *McDermott Int'l. Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199 (5th Cir. 1991).

MOTIONS PENDING BEFORE THIS COURT

The three Motions and related Memoranda in Opposition and Reply Memoranda pending before this court address, in some form, the question of the enforceability of the policy provisions requiring arbitration. While nonetheless providing a ruling on each individual Motion, this Minute Entry will address collectively the issues raised by all the pending Motions.

PROVISION OF THE POLICY REQUIRING ARBITRATION

The issues raised in the pending Motions focus largely on the arbitration clause contained in the policy. It states

> ¶ Arbitration
>
> All differences arising out of this contract shall be referred to the decision of any arbitrator to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, one to be appointed in writing by each of the parties and in case of disagreement between the two arbitrators to the decision of any umpire to be appointed in writing by the arbitrators or by a court of competent jurisdiction within the limits of the United States of America. It is agreed that the place of arbitration shall be designated by the Assured

and the expenses in connection with the arbitration shall be borne equally between the parties in difference.

PRESUMPTION OF ARBITRATION

The United States Supreme Court has expressed a strong presumption favoring the enforcement of arbitration provisions whenever possible. "Section 2 [of the Arbitration Act] is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 103 S.Ct. 927, 941 (1983).[3] Further, "the Courts of Appeals have since consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree. The Arbitration Act establishes that, as a matter of federal law, *any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . .* " *Id.* at 941 (emphasis added).

Citing its decision in *Moses H. Cone*, the Supreme Court explained that its liberal policy favoring arbitration agreements supports its policy guaranteeing the enforcement of private contractual arrangements. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S.Ct. 3346, 3353 (1985) (citation omitted).[4] More specifically, the Court "conclude[d] that concerns of international

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[3] The dispute in this case involved a construction contract containing an arbitration clause.

[4] The dispute in this case involved a sales agreement containing an arbitration clause.

comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, *even assuming that a contrary result would be forthcoming in a domestic context." Id.* at 3355. (emphasis added).

Enforcing an arbitration clause in a dispute over certain contract modifications, our own Fifth Circuit acknowledged that "[a] presumption of arbitrability exists requiring that whenever the scope of an arbitration clause is fairly debatable or reasonably in doubt, the court should decide the question of construction in favor of arbitration." *Mar-Len of Louisiana, Inc. v. Parsons-Gilbane,* 773 F.2d 633, 635 (5th Cir. 1985) (citation omitted).

Further, in a 1988 opinion, the Eastern District enforced an arbitration agreement in *Seafort Shipping Corp. v. The West of England Ship Owners Mut. Protection and Indem. Ass'n,* 1988 U.S. Dist. LEXIS 14294 (E.D. La. 1988). In *Seafort,* Judge Sear explained that

> where a contract contains an arbitration clause, 'there exists a strong presumption that arbitration should not be denied "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue" '. *Phillips Petroleum Co. v. Marathon Oil Co.,* 794 F.2d 1080 (5th Cir. 1986) (quoting *Houston General Insurance Co. v. Realex Group, N.V.,* 776 F.2d 514 (5th Cir. 1985)). The Fifth Circuit has gone so far as to hold that even when a contract containing an arbitration clause was void from its

> inception, the arbitration clause would still be enforceable. (*see Lawrence v. Comprehensive Business Serv. Co.*, 833 F.2d 1159 (5th Cir. 1987)).

Id. at *14-15.

Article II of the Convention[5] contemplates a limited inquiry by the courts when considering whether or not to enforce an arbitration agreement, specifically: (1) Did the parties agree in writing to arbitrate the dispute; and (2) Is the arbitration agreement null and void, inoperative or incapable of being performed? There is no doubt that the policy in this case contains a broad arbitration provision[6]. McDermott, however, has set forth arguments urging this court to find that the arbitration provision is null and void, inoperative or incapable of being performed. For reasons more fully explained below, this court disagrees and finds that controlling jurisprudence requires the enforcement of the policy's arbitration provision between McDermott and Underwriters. The policy between McDermott and Underwriters provides for all differences to be resolved through arbitration. This court is unpersuaded by arguments that the unique facts of this case require a different result.

ARBITRATION PROVISION IS VALID AND ENFORCEABLE UNDER THE CONVENTION

McDermott argues that the Convention "specifies that a Court shall not refer the parties to arbitration if the

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[5] 9 U.S.C. § 201.

[6] *McDermott Int'l., Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1206 (5th Cir. 1991).

agreement to arbitrate is null and void . . . [or] when the law governing the contract makes the agreement invalid or when public policy requires."[7] To utilize this provision, McDermott further argues that the McCarran-Ferguson Act[8] requires the application of Louisiana law, specifically R.S. 22:629, which it argues prohibits the enforcement of compulsory arbitration.

However, in keeping with the strong policy of favoring enforcement of arbitration agreements, the courts have created a body of federal substantive arbitration law applicable in both federal and state courts. *Southland Corp. v. Keating*, 104 S. Ct. 852, 859 (1984) (citation omitted). Examining the legislative history, the Court noted that Congress "contemplated a broad reach of the [Arbitration] Act, unencumbered by state-law constraints." *Id.* at 859. Citing *Munro Indus. Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382, 387 (2nd Cir. 1961), the Court found that " 'the purpose of the act was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges, or . . . by state courts or legislatures.' " *Id.*

Accordingly, this court rejects argument that the McCarran-Ferguson Act mandates the application of Louisiana law in favor of applying federal arbitration law.

LOUISIANA STATUTORY LAW IS INAPPLICABLE

McDermott raises a two-part argument urging that arbitration is inappropriate. First McDermott argues that to order arbitration in this matter would be contrary to

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[7] McDermott's Memorandum in Opposition to Defendants' Motion to Compel Arbitration and Stay Litigation, at p.24.

[8] 15 U.S.C. § 1011, et. seq.

the McCarran-Ferguson Act which "provides that the states, and only the states, can regulate the substantive content of insurance contracts. . . . "[9] Second, McDermott argues for application of Louisiana insurance law to this dispute specifically R.S. 22:629(A)(2)[10], which it interprets as prohibiting arbitration agreements in the context of insurance.

Because the McCarran-Ferguson Act is inapplicable here, this argument fails on both levels. The McCarran-Ferguson Act does not apply to contracts made under the Convention, as it was intended to apply only to interstate commerce, not to foreign commerce.[11] Likewise, the

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[9] McDermott's Memorandum in Opposition to Defendants' Motion to Compel Arbitration and Stay Litigation, at p.27.

[10] R.S. 22:629 states in pertinent part

> A. No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state . . . regardless of where made or delivered shall contain any condition, stipulation, or agreement . . . (2) depriving the courts of this state of the jurisdiction of action against the insurer. . . .

[11] *See Triton Lines, Inc. v. Steamship Mut. Underwriting Assoc.*, 707 F. Supp. 277, 278-79 (S.D. Tex. 1989), which provides:

> Triton urges that the Federal Arbitration Act does not apply to this contest since another federal statute [the McCarran-Ferguson Act] abandons the field of regulation of the business of insurance to the states. . . . A disputed claim is not the business of insurance. . . . The McCarran Act has never been held to have abrogated federal procedural practices in federal court cases. . . . The anti-arbitration provision of the Texas Insurance Code, therefore, is countermanded by the Federal Arbitration Act. (*See Life of American Ins. Co. v. Aetna Life Ins. Co.*, 744 F. 2d 409 (5th Cir. 1984).

Convention makes clear that it does not apply to purely interstate disputes.[12]

Jurisprudence is clear that when state laws conflict with the Convention, the Supremacy Clause mandates the application of the Convention. In *Southland Corp.*, the Supreme Court addressed a state law provision that directly conflicted with the Federal Arbitration Act, *Southland Corp.*, 104 S.Ct. at 853. Finding that the conflicting state law provision violated the Supremacy Clause, the Court strongly stated "[i]n creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Id.* at 861. (referring to the Arbitration Act).

Ruling in accordance with the Supreme Court, the Fifth Circuit, citing *Southland Corp.*, stated

> "In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." . . . thus, the Court held that the Arbitration Act preempted a state law that purported to withdraw the power to enforce arbitration agreements. . . . in a case involving actual conflict between state and federal regulation, "[a] holding of federal exclusion of state law is inescapable . . . when compliance with

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[12] 9 U.S.C. § 202. ("An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention . . .).

> both . . . is an impossibility" . . . Rather, federal preemption is, in such a case, automatic.

Commerce Park at DFW Freeport v. Mardian Construction Co., 729 F.2d 334, 338-340 (5th Cir. 1984) (citation omitted).

Accordingly, this court finds that federal arbitration law, not Louisiana statutory law is applicable to this case. To the extent that Louisiana law prohibits agreements to arbitrate in the context of insurance agreements, federal law favoring arbitration preempts it.[13]

"THE LETTER" DID NOT CREATE A SETTLEMENT CONTRACT

McDermott has constructed a tenuous argument to preclude arbitration based on a September 11, 1990 letter ("the letter") from Mike Donnelly of Maxon Young Associates, Inc. to John Bothman of McDermott.[14] McDermott

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[13] Because the court finds that Louisiana law is preempted, it is unnecessary to address the issues raised concerning the requirements of R.S. 22:629 that the insurance contract must be (1) delivered or issued for delivery in Louisiana; and (2) covering subjects located, resident or to be performed in Louisiana. *See* Underwriters' Motion to Compel Arbitration and to Stay Litigation, at p.18-23; and McDermott's Memorandum in Opposition to Defendants' Motion to Compel Arbitration and to Stay Litigation, at p.33-42.

[14] The letter provides as follows

> This will serve to confirm that the above – referenced policy does provide coverage for the Design Error problem involving Heat Pipe Units Nos. 1 and 2 at the Baltimore Gas & Electric Crane Facility.
>
> The referenced policy does not respond to costs to correct the design error, i.e., the replacement of the

argues that the letter itself creates a "new contract" or "settlement contract" between the parties, and that this "new contract" does not itself require arbitration.[15] In support of its position, McDermott asserts that Maxon Young, acting as Underwriters' agent, bound Underwriters to pay all of McDermott's damages, with the exception of the cost of replacing the working fluid. McDermott further asserts that Underwriters waived any right to arbitration through the creation of a new contract by the letter.[16]

To accept McDermott's arguments of waiver and settlement, the court would have to find that the letter itself is a separate contract between McDermott and Underwriters. The court finds that this argument is without merit. Even *if* – and the if is a big one – this court believed that the letter was "an offer", and *if* Maxon Young acted with

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working fluid; but does respond to the cost of damages due to such Design Error, which, in this case, would include demolition and replacement of the Heat Pipe units with a system no more expensive than the original installation.

Please note, we have requested that the $26,666,000.00 estimate be correlated with the original installation costs of the Crane Facility Heat Pipe Units Nos. 1 and 2.

Please feel free to call upon the undersigned, should you need further confirmation of coverage, or if we can be of additional assistance.

[15] McDermott's Memorandum in Opposition to Defendants' Motion to Compel Arbitration and to Stay Litigation, at p.8, 23.

[16] *Id.* at 5.

actual or apparent authority[17] to bind Underwriters to a settlement agreement and, *if* McDermott was an "innocent" third person which reasonably believed that through the letter Maxon Young was making a binding offer on behalf of Underwriters for payment of a $36,000,000.00 claim – there would still be no separate contract. Even resolving all these "ifs" in favor of McDermott, there is no showing that McDermott accepted these supposed offers and thus created a new contract.

Logic dictates that the court's rejection of McDermott's argument that the letter created a settlement contract also defeats its claim of waiver of arbitration rights by Underwriters. Instead, the court finds that Underwriters did not, through action or inaction, waive their rights under the policy to arbitration.

Finally, in *Moses Cone*, the Supreme Court held

> The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or *an allegation of waiver, delay, or a like defense to arbitrability.*

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[17] La. Civ. Code art. 2997 states that an agent must have express power to compromise a matter or acknowledge a debt. Further, the judicially created doctrine of apparent authority requires that the principal put his agent in such a position or has acted in such a manner as to give an innocent third person the reasonable belief that the agent has authority to act for the principal. *see AAA Tire & Export, Inc. v. Big Chief Truck*, 385 So.2d 426, 429 (La. App. 1st Cir. 1980).

Moses Cone, 103 S.Ct. at 941 (emphasis added) (citation omitted). Clearly, any additional allegations or defenses addressing the enforceability the policy can and should be resolved through arbitration.

"SERVICE OF SUIT" CLAUSE DOES NOT DEFEAT ARBITRATION PROVISION

In its Memorandum in Support of its Motion to Remand, McDermott argues that "[t]his [c]ourt need not and should not decide whether the Convention properly applies or whether the arbitration provision is enforceable."[18] Instead, McDermott urges this court to remand "in light of [McDermott and Underwriters'] contractual agreement to submit to a court of McDermott's choosing."[19]

McDermott argues that by filing suit in state court, it exercised the "service of suit" or "forum selection" clause[20], therefore Underwriters' right of removal was

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[18] McDermott's Memorandum in Support of its Motion to Remand, at p.2.

[19] *Id.*

[20] The policy provision, entitled "Service of Suit Clause" states

> It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the Assured will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practices of such Court. . . .

waived. However, the Fifth Circuit, construing the identical policy, held "[t]he service-of-suit clause *does not explicitly waive* Underwriters' removal rights." *McDermott Int'l., Inc.*, 944 F.2d at 1206. The court found that the policy had two forum selection clauses, the arbitration clause and the service of suit clause, which apply to different types of disputes, and that alternate possible meanings for the service of suit clause existed. *Id.* at 1207. The court explained that it "will give effect only to explicit waivers of Convention Act removal rights." *Id.* at 1209. The court further noted that "[f]uture forum choice disputes in Convention cases will not languish in this court under our bright-line express waiver rule." *Id.* at 1213. In light of this ruling, McDermott's assertion that Underwriters had a duty to affirmatively reserve their removal rights is without merit.

The case before this court was properly removed pursuant to the Convention. Because the court finds that the service of suit clause does not preclude removal, and that Underwriters did not explicitly waive their removal rights in the policy, McDermott's Motion to Remand is denied.

REQUEST FOR JURY TRIAL DENIED

McDermott urges that should this court deny its demand that this case proceed at law, then it is entitled to a jury trial, pursuant to 9 U.S.C. § 4, which it claims reserves the right to a jury trial when either the making of the arbitration agreement, or the alleged failure, neglect, or refusal of the party to comply with an arbitration agreement is at issue.

9 U.S.C. § 4 states in pertinent part

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed . . . *If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue,* the court shall proceed summarily to the trial thereof.

(emphasis added).

As the party resisting arbitration, McDermott has the burden of showing that it is entitled to a jury trial. *Bhatia v. Johnston,* 818 F.2d 418 (5th Cir. 1987). The court finds that McDermott has failed to meet its burden, and that neither the making of the arbitration agreement nor the refusal of McDermott to submit to arbitration are at issue in this matter. As the Supreme Court noted

> a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction by the courts.

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 87 S.Ct. 1801, 1806 (1967). Accordingly, McDermott's request for a jury trial is denied.

REMAINDER OF SUIT STAYED PENDING ARBITRATION

In a case upholding a district court's order staying a portion of an action pending arbitration, the Fifth Circuit

ruled that the district court had discretion to include in its stay order claims of litigants not party to the contract containing the arbitration clause. *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976). (*see also Seafort Shipping Corp.*, 1988 U.S. Dist. LEXIS 14294 at *15 – holding that the district court has discretion to stay the litigation of claims that are not within the scope of the arbitration agreement.)

This court finds it appropriate to stay the litigation of claims pending in this matter that are not subject to the arbitration provision of the policy.

CONCLUSION

IT IS ORDERED that McDermott and Underwriters must submit to arbitration pursuant to the provisions of the policy and 91-841 is stayed pending the resolution of arbitration. IT IS FURTHER ORDERED that this action is also stayed as to parties and claims not subject to arbitration[21]. Accordingly;

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[21] In addition to ordering arbitration in the suits nos. 91-871 and 91-3601, consolidated under no. 91-841, this action is stayed as to the following suits consolidated under no. 91-841:

1. 91-3469 "D" (5)
   Orion Insurance Co. P.L.C., et al v. Maxon Young Associates, Inc.

   This is an action by Plaintiffs, those certain Institute of London Underwriters Companies subscribing to Policy of Insurance No. 552/832127500, for indemnification by Maxon Young for any damages that may be assessed against the Plaintiffs in an action by McDermott.

2. 91-3842 "D" (5)
   McDermott International, Inc. v. Maxon Young Associates, Inc. and Certain Underwriters at Lloyd's London, Subscribing to Policy No. ZKN90000144/C1053-1-90

The following Motion is GRANTED:

1. Motion of Defendant John Richard Ludbrooke Youell, as representative of those certain Underwriters at Lloyd's, London, subscribing to Memorandum of Insurance No. 104207, to Compel Arbitration;

The following Motions are DENIED:

2. Motion of Plaintiff, McDermott International, Inc., for Summary Judgment; and

3. Motion of Plaintiff, McDermott International, Inc., to Remand.

* * *

This is an action for damages for reliance by McDermott on Maxon Young's representations, to recover from Maxon Young the benefits of McDermott's contract with Underwriters, the proceeds of the insurance policy.

3. 91-3437 "D" (5)
John Richard Youell – Representing Certain Underwriters at Lloyd's London Subscribing to Memorandum of Insurance No. 104207 v. Maxon Young Associates, Inc.

This is an action for indemnification of Underwriters by Maxon Young for any damages that may be assessed against Underwriters in an action brought by McDermott.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3568

MCDERMOTT INTERNATIONAL, INC.,

Plaintiff-Appellee,

versus

LLOYDS UNDERWRITERS OF LONDON, JOHN RICHARD LUDBROOKE YOUELL as rep of those Certain Underwriters Subscribing to Memorandum of Insurance No. 104207,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

(October 3, 1991)

Before REAVLEY, JONES and SMITH, Circuit Judges.

REAVLEY, Circuit Judge:

The district court remanded this case to state court on the ground that an insurance policy issued by underwriters at Lloyds, London (Underwriters) to McDermott International, Inc. (McDermott) gave McDermott the right to choose the forum where the policy's arbitration provision would be enforced. We consider the court's remand order appealable and vacate it.

I. BACKGROUND

McDermott bought an all risks installation floater policy from Underwriters every year from 1952 to 1989. This case concerns construction of the following two clauses in the 1989 policy:

> 8. Service of Suit Clause
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> It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the Assured will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such court.
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> It is further agreed that service of process in such suit may be made upon Messrs. Mendes & Mount, Three Park Avenue, New York, N.Y. 10016 and that in any suit instituted against any one of them upon this contract, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.
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> The above-named are authorized and directed to accept service of process on behalf of Underwriters in any such suit and/or upon the request of the Assured to give a written undertaking to the Assured that they will enter a general appearance upon Underwriters' behalf in the event such a suit shall be instituted.
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> . . .

9. Arbitration

All differences arising out of this contract shall be referred to the decision of any arbitrator to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, one to be appointed in writing by each of the parties and in case of disagreement between the two arbitrators to the decision of any umpire to be appointed in writing by the arbitrators or by a court of competent jurisdiction within the limits of the United States of America. It is agreed that the place of arbitration shall be designated by the Assured and the expenses in connection with the arbitration shall be borne equally between the parties in difference.

McDermott's subsidiary, the Babcock and Wilcox Company (B&W), supplies utilities with electric power generation equipment and structures. In 1989, a chemical reaction irreparably damaged two air heat exchangers that B&W was installing for Baltimore Gas & Electric Company.

McDermott submitted a policy claim for its losses from the Baltimore incident, Underwriters denied coverage, and McDermott sued on the policy for $39,247,000 in Louisiana state court. Underwriters demanded that McDermott submit to arbitration of the issues in the state suit. The demand prompted McDermott to file a separate petition asking the Louisiana court to declare that McDermott had no obligation to arbitrate.

Underwriters removed both suits to federal district court under 9 U.S.C. § 205. McDermott filed a motion to remand the cases. The district court held that *City of Rose*

City v. Nutmeg Ins. Co., 931 F.2d 13 (5th Cir. 1991) establishes that, pursuant to the policy's service-of-suit clause, McDermott is entitled to choose the forum where the parties' dispute regarding arbitration will be resolved. The court remanded the cases to Louisiana state court.

McDermott asks us to review the district court's remand order either by appeal or writ of mandamus.

II. APPELLATE JURISDICTION

We hold that the district court's remand order is appealable, but this requires explanation. We begin with the proposition that the availability and means of appellate review for a district court's remand order depend entirely on the court's reason for issuing the order.[1]

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[1] In *re Merrimack Mut. Fire Ins. Co.*, 587 F.2d 642 (5th Cir. 1978) represents this court's jurisprudence on remand reasoning disclosure. The *Merrimack* court refused to compel a district judge to state a permissible ground for remand where the court's order was ambiguous as to remand propriety. *Id.* at 647-48. We question the continuing validity of *Merrimack* because it relies on the Supreme Court's statement in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584 (1976) that 28 U.S.C. § 1447(c) "states the *exclusive* grounds for remand." *Merrimack*, 587 F.2d at 644. The Court has retreated from this absolutist view of § 1447(c). See *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 108 S.Ct. 614, 621-22 (1988) (*Thermtron* does not limit district court's discretion to remand pendent claims to state court rather than dismiss them). Because the permissible grounds and means of reviewing remand orders have expanded considerably since *Merrimack's* strict adherence to *Thermtron*, and the availability and means of appellate review turns exclusively on the district court's reason for remand, district courts should take care to explain their reasons for remanding cases.

A. Unreviewable Remand Orders

Congress denies us authority to review remand orders that district courts issue under 28 U.S.C. § 1447(c) for lack of subject-matter jurisdiction. 28 U.S.C. § 1447(d). And although the question is presently undecided, section 1447(d) may also preclude our review of a district court's granting of a *timely* motion to remand due to defects in removal procedure. *In Re Shell Oil Co.*, 932 F.2d 1518, 1520 n.5 (5th Cir. 1991). The district court remanded this case pursuant to the policy's service-of-suit clause, a reason outside the scope of section 1447(c). Section 1447(d) does not bar our review. *Id.* at 1520-21.

B. Appellate Review by Appeal versus Mandamus

The parties dispute whether review is appropriate by appeal or mandamus. These methods of review are mutually exclusive, *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 8 n.6, 103 S.Ct. 927, 933 n.6 (1983), and we look to precedent to decide which to exercise in this case.

In *Thermtron*, the Supreme Court held that remand is only allowed in accordance with section 1447(c) and a writ of mandamus under 28 U.S.C. § 1651 is the proper tool for securing a district judge's compliance with this rule. *Id.* at 352-53, 96 S.Ct. 593-94 (ordering district judge to hear case remanded due to crowded federal docket). The Court chose to review by mandamus because it understood its precedent to establish that a remand order is not a "final decision" within the meaning of the direct

appeal statute, 28 U.S.C. § 1291.[2] *Id.* at 352-53, 96 S.Ct. at 594 ("because an order remanding a removed action does not represent a final judgment reviewable by appeal, '[t]he remedy in such a case is by mandamus to compel action. . . . ' ") (quoting *Railroad Co. v. Wiswall*, 90 U.S. (23 Wall.) 507, 508 (1875)).[3]

The Court next chose between direct appeal and mandamus in *Moses H. Cone*. Like this case, *Moses H. Cone* concerned the question of whether the arbitrability of a dispute between a hospital and a contractor would be decided in federal or state court. The hospital sued the contractor in state court for a declaration that their dispute was not subject to arbitration. The contractor then filed a separate action in federal court to resolve the same arbitrability question. The district court exercised its discretion under *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236 (1976) to stay the federal proceeding pending resolution of the state suit. *Moses H. Cone*, 460 U.S. at 4-7, 103 S.Ct. at 931-32. The Court held that the district court's stay order was an appealable collateral order under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221 (1949) because it: 1) conclusively determined the issue of which forum

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[2] Section 1291 provides, "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court."

[3] *But see* 15 WRIGHT, MILLER, AND COOPER, FEDERAL PRACTICE AND PROCEDURE § 3914 at 549-50 (1976) ("[i]f the [*Thermtron*] Court had specifically focused on the method of review, it would have been better advised to recognize the availability of appeal").

would decide the arbitrability question; 2) resolved this important issue that was completely separate from the merits of the action; and 3) was effectively unreviewable on appeal from a final judgment in the case. *Id.* at 11-13, 103 S.Ct. at 934-35. *Moses H. Cone* does not mention *Thermtron.*

The Court last considered remand review in *Cohill,* 108 S.Ct. at 621-22. There, the district court allowed the plaintiff in an age discrimination suit to delete the federal claims from his complaint and remanded the remaining pendent claims to state court. The defendant employer filed a notice of appeal and a petition for mandamus with the Third Circuit to keep the case in federal court. A panel of the Third Circuit held the appeal barred by section 1447(d) but granted the petition for mandamus. *See Id.* at 617 & n.4. Sitting *en banc,* the Third Circuit reversed the panel's decision to grant mandamus. The Supreme Court affirmed the *en banc* decision, ruling that a district court may remand pendent claims when it has the discretion to dismiss them even though no statute sanctions such a remand. *Id.* at 622.

Cohill is important to our resolution of this case because it expressly precludes our reading *Thermtron* to require statutory authorization for all remands. *Id.* at 621. However, *Cohill* does not address the issue of whether review of a district court's discretionary remand order should be by appeal under *Moses H. Cone'* rationale[4] or by mandamus. The Court simply affirmed the *en banc* court's

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[4] *Cohill* does not mention *Moses H. Cone.*

final decision to refuse mandamus. Although the defendant employer could have put before the Supreme Court the panel decision to review the district court's remand order by mandamus rather than appeal, it did not do so. *See* Brief of Petitioners, *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 108 S.Ct. 614 (1988), (No. 86-1021) (LEXIS, Genfed library, Briefs file) (only question presented was whether district court could remand on ground not listed in section 1447(c)).

We read *Thermtron*, *Moses H. Cone*, and *Cohill* to instruct that we review the district court's remand order, which the court issued pursuant to the parties' contract, on appeal under *Cohen's* collateral order doctrine. *Thermtron* requires review by mandamus only when a district court has remanded a case without authority to do so. When the Court issued *Thermtron*, a district court's only authority for remanding a case was section 1447(c), and review of section 1447(c) remands is barred by section 1447(d). Then *Cohill* established that remand is appropriate when a district court has discretion to dismiss a case. This court has recognized a district court's authority to remand a case pursuant to the parties' contract. *Nutmeg*, 931 F.2d at 16 (directing district court to remand); *see also M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8-12, 92 S.Ct. 1907, 1012-14 (1972) (district court must enforce forum selection clause directing dispute to London Court of Justice unless resisting party shows enforcement to be unreasonable). Meanwhile, *Moses H. Cone* established that a district court's stay that effectively allows a state court to decide the question of arbitrability

is an appealable collateral order.[5] The court's remand order here has the same effect on resolution of the identical issue, and we do not believe that we are restricted to the *Thermtron* review methodology simply because the

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[5] McDermott wants us to review this case under mandamus standards which are more deferential to the district court's decision than appeal standards. *See In Re First South Sav. Ass'n*, 820 F.2d 700, 714-15 (5th Cir. 1987), *Southern Pacific Transp. Co. v. San Antonio, Tex.*, 748 F.2d 266, 270 (5th Cir. 1984) (mandamus is extraordinary, discretionary writ only available to remedy clear abuse of discretion). McDermott argues that *Corcoran v. Ardra Ins. Co., Ltd.*, 842 F.2d 31, 36 (2d Cir. 1988) properly considers *Moses H. Cone*, but still holds that *Thermtron* and *Cohill* require that a court's discretionary remand order be reviewed by mandamus.

We think that *Corcoran* is wrongly decided. The *Corcoran* court felt obliged by *Cohill* to review the district court's discretionary remand order by mandamus. *Id.* at 35. But we have previously explained that *Cohill* did not address the proper means of review of a discretionary remand order. Moreover, the *Corcoran* court did not adequately distinguish *Karl Koch Erecting Co. v. New York Convention Center Development Corp.*, 838 F.2d 656 (2d Cir. 1988), where the Second Circuit followed *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 278 (9th Cir. 1984), which followed *Moses H. Cone* in ruling that contractual remand orders are reviewable by appeal. *See Karl Koch*, 838 F.2d at 658. The *Corcoran* court attempted to distinguish *Karl Koch* on the ground that the effect of the contractual remand order in *Karl Koch* was to determine the forum in which the litigation would be decided, whereas the effect of the discretionary remand order in *Corcoran* was only to determine which forum would decide the arbitrability question. *Corcoran*, 842 F.2d at 35. This reasoning fails to consider that *Moses H. Cone*, on which *Karl Koch* relies, treated as appealable an order that, like the orders at issue here and in *Corcoran*, only decided which forum would decide the arbitrability question. *See Moses H. Cone*, 460 U.S. at 11-13, 103 S.Ct. at 934-35.

procedural posture of this case allowed the district court to issue a remand order rather than a stay.[6]

Thermtron and its progeny use mandamus to require district judges to decide issues of remand on proper grounds. In *Moses H. Cone,* however, the Court never questioned that it was within the district court's discretion to stay the federal proceeding pursuant to *Colorado River. Moses H. Cone* simply explained that the district court abused that discretion. 460 U.S. at 19, 103 S.Ct. at 938. Because under *Cohill* and *Nutmeg,* district courts have authority to remand cases pursuant to contract, the district judge here did not act without authority; mandamus under *Thermtron* is inappropriate. *See Schlagenhauf v. Holder,* 379 U.S. 104, 112, 85 S.Ct. 234, 239 (1964) ("[t]he writ of mandamus is not to be used when 'the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction' ") (quoting *Parr v. United States,* 351 U.S. 513, 520, 76 S.Ct. 912, 917 (1956)). Here we are concerned with the propriety of the district court's contract construction, and *Moses H. Cone*

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[6] Because the district court's remand order so closely parallels the stay order at issue in *Moses H. Cone,* it qualifies as a collateral order under this court's rendition of the collateral order doctrine's requisites:

> (1) The order must finally dispose of a matter so that the district court's decision may not be characterized as tentative, informal or incomplete; (2) the question presented must be serious and unsettled; (3) the order must be separable from, and collateral to, rights asserted in the principal suit; and (4) there should generally be a risk of important and probably irreparable loss if an immediate appeal is not heard.

Acosta v. Tenneco Oil Co., 913 F.2d 205, 207 (5th Cir. 1990).

permits us to review the court's collateral remand order by direct appeal.[7]

Our reasoning and decision as to the proper means of review of the district court's order accord with the four other courts of appeals that have considered this question. *Foster v. Chesapeake Ins. Co., Ltd.*, 933 F.2d 1207, 1211 n.6 (3d Cir. 1991); *Regis Associates v. Rank Hotels (Management), Ltd.*, 894 F.2d 193, 194-95 (6th Cir. 1990); *Karl Koch*, 838 F.2d at 658-59 & n.1 (2d Cir. 1988); *Pelleport*, 741 F.2d at 277-78 (9th Cir. 1984).

This court has never before reviewed a district court's remand order and found that the court issued the order on a non-statutory, yet permissible, basis. Our prior cases all concern courts' attempts to remand for reasons other than those allowed under federal statute, contract, or discretionary dismissal jurisprudence.[8] *See In Re Shell Oil Co.*, 932 F.2d at 1519-21 (remand based on untimely motion to remand for lack of removal jurisdiction ordered retracted by mandamus); *In Re Allied-Signal, Inc.*, 919 F.2d

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[7] Though the Court stated in *Thermtron* that remand orders are not final judgments reviewable by appeal, *Moses H. Cone* characterized the collateral order doctrine as an "exception to the finality rule." 460 U.S. at 11, 103 S.Ct. at 934.

[8] In *New Orleans Public Service, Inc. v. Majoue*, 802 F.2d 166, 167 (5th Cir. 1986), this court stated that "[t]he only vehicle for relief from a remand order is the writ of mandamus." But because the *Majoue* court held that section 1447(d) deprived it of jurisdiction over the appeal, we disregard this statement as dicta. It is also incorrect dicta in light of *Thermtron's* limited holding that "mandamus is an appropriate remedy to require the District Court to entertain [a] remanded action." 423 U.S. at 352, 96 S.Ct. at 593 (emphasis added); accord *In Re Allied-Signal, Inc.*, 919 F.2d 277, 279 (5th Cir. 1990).

277, 279 (5th Cir. 1990) (remand based on state statute purporting to direct suits against political subdivisions to state court ordered retracted by mandamus); *In Re Shell Oil Co.*, 631 F.2d 1156, 1157-58 (5th Cir. Unit A 1980) (remand premised on lack of timely opposition to remand motion ordered retracted by mandamus).

To summarize, a district court may remand a case pursuant to a statute, a contract between the parties, or when it has discretion to dismiss the action. We review by mandamus allegations that the court has remanded for any other reason. Congress prohibits us from reviewing remand orders based on section 1447(c). We review contractual remand orders by direct appeal.

III. MERITS

Our resolution of this case is complicated by the fact that the parties by their contract, Congress by statute, and this court by precedent have all stated legal standards that we must apply to the issues now disputed. Our decision accords with these standards while respecting the legitimate concern of the international business community for prompt and predictable resolution of forum choice disputes.

A. The Parties: Contract Ambiguity

We review the district court's interpretation of the policy *de novo*, *USX Corp. v. Tanenbaum*, 868 F.2d 1455, 1457 (5th Cir. 1989), and find that Underwriters did not unambiguously give McDermott the right to choose

which forum would decide the arbitrability of their policy disputes. We recognize two alternate readings of the policy's service-of-suit and arbitration clauses.

1. *Service-of Suit as Alternate Forum Selection Clause*

When a policy's service-of-suit clause applies, its probable effect is to waive the insurer's removal rights. *See, e.g., Nutmeg,* 931 F.2d at 15-16; *Cessna Aircraft Co. v. Fidelity & Casualty Co. of New York,* 616 F.Supp. 671, 674 (D.N.J. 1985). But the policy's service-of suit clause does not necessarily apply to disputes concerning the proper forum to decide arbitrability questions. The service-of-suit clause applies "in the event of the failure of Underwriters . . . to pay any amount claimed to be due [under the policy]." McDermott and the district court reasoned that Underwriters' denial of McDermott's policy claim invoked the policy's service-of-suit clause, but they ignore the policy's arbitration clause in doing so. *See Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A.,* 760 F.2d 390, 395-96 (2d Cir. 1985) ("where two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect").

If the service-of-suit clause is a forum selection clause, the arbitration clause is a co-equal forum selection clause. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 629, 105 S.Ct. 3346, 3355 (1985) (arbitration agreement is a forum choice). The arbitration clause applies to "all differences arising our [sic] of [the policy] contract." The questions of whether the parties'

coverage dispute is arbitrable and who decides arbitrability are undoubtedly differences arising out of the policy. *See Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Co. (Pemex)*, 767 F.2d 1140, 1150 n.26 (5th Cir. 1985) (arbitrators should decide arbitrability questions after court determines that dispute subject matter is covered by the arbitration clause and party initiating arbitration is covered by clause).

Underwriters executed the policy thinking that a subset of all disputes – those arising from the policy – would be determined by arbitration. The service-of-suit clause's "failure to pay a claim" provision could be interpreted consistent with the arbitration clause to apply to suits concerning enforcement of an arbitration award. *See NECA Ins., Ltd. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 595 F.Supp. 955, 958 (S.D.N.Y. 1984) (arbitration not waived by service-of-suit clause because service-of-suit clause only "designed to guarantee the enforcement of arbitration awards"); *see also Hart v. Orion Ins. Co.*, 453 F.2d 1358, 1361 (10th Cir. 1971) (unspecified service-of-suit clause consistent with arbitration clause). Enforcement suits do not concern differences arising from the parties' contract, but rather differences concerning the propriety of the arbitration proceedings held pursuant to that contract. Thus, the policy may be read as contemplating that a claim for failure to pay under the policy not be made in court until after an arbitration proceeding.[9]

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[9] The policy also permits the parties to have "a court of competent jurisdiction within the limits of the United States of America" choose a neutral third umpire. Policy ¶ 9.

The parties did not consider in their contract that a court order may be necessary to compel arbitration. It is just as likely that the parties did not provide for this contingency in their agreement as it is that they intended the service-of-suit clause to apply to all disputes not actually arbitrated. That the service-of-suit clause applies only when Underwriters refuses to *pay*, instead of "to all disputes not submitted to arbitration," increases the plausibility of the former interpretation. We also wonder why Underwriters would secure an almost infinitely broad arbitration clause and also permit McDermott to attack it in the court of its choice.

2. *Service-of-Suit as Submission to Personal Jurisdiction*

When McDermott first bought a Lloyds, London policy containing the service-of-suit clause in 1952, this court did not enforce agreements to waive removal rights. *See Carbon Black Export, Inc. v. The SS Monrosa*, 254 F.2d 297, 300-301 (5th Cir. 1958), *cert. dismissed*, 359 U.S. 180, 79 S.Ct. 710 (1959), *disapproved by M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9, 92 S.Ct. 1907, 1912-13 (1972). Underwriters thus possibly understood that by allowing the service-of-suit clause, they only consented to personal jurisdiction in a court selected by McDermott, but they did not waive any removal rights.[10]

The service-of-suit clause does not explicitly waive Underwriters' removal rights. It requires Underwriters to

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[10] Consent to personal jurisdiction is of value especially with respect to defendants that are incorporated and have their principal place of business abroad. *See Hart*, 453 F.2d at 1361.

"submit to the jurisdiction of any court [chosen by McDermott]," "comply with all requirements necessary to give such Court jurisdiction," and "abide by the final decision of such Court." It also decrees that "all matters arising hereunder shall be determined in accordance with the law and practice of [the court chosen by McDermott]." Underwriters' exercise of its federal removal right is not necessarily inconsistent with any of its obligations under the service-of-suit clause. Underwriters may remove a case after submitting to the jurisdiction of Louisiana's courts and complying with all necessary requirements to give Louisiana's courts power over the suit. There would be no final decision in that court for Underwriters to abide by if it exercised its removal right. All matters would be determined in accordance with the practice and law of the court chosen by McDermott in the sense that all state courts follow the removal law established by Congress. *See Keaty v. Freeport Indonesia, Inc.*, 503 F.2d 955, 956-57 (5th Cir. 1974) (directing federal district court in Louisiana to proceed with removed action despite contract that "shall be construed and enforceable according to the law of the State of New York" and wherein the "parties submit to the jurisdiction of the courts of New York").

At least one court has recognized that the same service-of-suit clause at issue here could be read to waive only objections to personal jurisdiction. *In Re Delta America Re Ins. Co.*, 900 F.2d 890, 893 (6th Cir.), *cert. denied, Wright v. Arion Ins. Co.*, ___U.S.___, 111 S.Ct. 233 (1990).

The existence of these alternate possible policy interpretations, in concert with the parties' stipulation that before this litigation, neither expressed an opinion as to

the effect of the service-of-suit clause on removability or the relationship between the service-of-suit and arbitration clauses, requires us to look to another authoritative source in deciding this case.

B. This Court: City of Rose City v. Nutmeg Ins. Co.

McDermott urges us to follow *Nutmeg*, where this court held that policy language virtually identical to the service-of-suit clause in this case waived the insurer's removal rights. *See* 931 F.2d at 16. But just as the same word may mean different things in different contracts, this case demonstrates that the effect of a contract clause may legitimately vary depending on the contract in which the clause lives: The *Nutmeg* court based its reasoning on facts that do not exist in this case, so *Nutmeg* does not control our decision.

Nutmeg Insurance Company relied on diversity jurisdiction to remove a suit filed by its policyholder's assignee in Texas state court. Record at 2, *City of Rose City v. Nutmeg Ins. Co.* (No. 90-0373). The district court refused the assignee's remand motion and granted Nutmeg summary judgment. This court reversed, holding that the district court should have remanded the case in accordance with the service-of-suit clause in Nutmeg's policy. The *Nutmeg* court agreed with the reasoning of several district courts that applied the "principle that ambiguities in contracts of insurance are to be construed against the drafter of the policy" in prior cases interpreting service-of-suit clauses. 931 F.2d at 15. Moreover, the court found Nutmeg's interpretation of the service-of-suit clause – that it only concedes personal jurisdiction as understood

by the Sixth Circuit in *Delta* – wholly untenable because, unlike the defendants in *Delta*, Nutmeg is a domestic corporation with its principal place of business in the United States. *Id.* Faced with no alternative meaning for the service-of-suit clause, language strongly implying waiver of removal rights, and the policy drafter principle, the court naturally held that Nutmeg waived its removal rights.

1. Lack of Ambiguity

The policy at issue in *Nutmeg* featured the service-of-suit clause as its only forum selection clause. As previously explained, the policy at issue here has two forum selection clauses that apply to different types of disputes. The arbitration clause's existence creates the possibility, not present in *Nutmeg*, that the parties would argue over arbitrability, and thus where arbitrability questions would be decided. The question presented to both courts in *Nutmeg* was whether Nutmeg was liable on its policy, a question that unmistakably invokes the service-of-suit clause's "failure . . . to pay" application language. But, as we have explained, the service-of-suit clause does not necessarily apply here because a suit to determine arbitrability is not necessarily a suit for failure to pay a claim.

Also, the *Nutmeg* court rejected the suggestion that the service-of-suit clause only concedes personal jurisdiction because Nutmeg is a domestic corporation with its principal place of business in the United States. But the court stated that it "made some sense" for the *Delta* court to read the service-of-suit clause there as only waiving objections to personal jurisdiction because it was possible

that some of the *Delta* defendants "were foreign corporations not otherwise subject to the jurisdiction of any court in the United States. . . . " *Id.* McDermott does not dispute the fact that at least some of their policy's underwriters are foreign citizens.

The existence of alternate possible meanings for the service-of-suit clause in the policy here at issue distinguishes *Nutmeg*.

2. *Drafter Principle*

Also unlike *Nutmeg*, here the principle that policy ambiguities are construed against the drafter does not help McDermott. While Underwriters' agents originally drafted the language of the service-of-suit clause, McDermott chose the clause for their policy. A broker representing McDermott in 1989, J.H. Minet, Inc., prepared a "slip" for Underwriters' approval. This slip merely listed the standard Lloyds, London clauses that McDermott wanted in the policy, including the service-of-suit clause. After Underwriters approved the slip submitted by Minet, Minet prepared a policy based on the slip. Then Underwriters' agent, the Lloyds Policy Signing Office, checked the policy submitted by Minet against the slip approved by Underwriters and executed the policy.

By having its agent decide upon both the slip and the policy, McDermott forfeits any benefit from the policy drafter principle. *See Eagle Leasing Corp. v. Hartford Fire Ins. Co.*, 540 F.2d 1257, 1261 (5th Cir. 1976) (principle does not apply where "[i]n substance the authorship of the policy is attributable to both parties alike"), *cert. denied*, 431 U.S. 967, 97 S.Ct. 2926 (1977); *see also Delta*, 900 F.2d at

892 n.4 (principle of resolving ambiguities against drafter of little value when parties have relatively equal sophistication and bargaining power).[11] Without the presumption afforded by the policy drafter principle, and in the face of alternate possible interpretations of the service-of-suit clause, McDermott cannot rely on *Nutmeg*.

C. Congress: The Convention Act

In 1970, Congress ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention) to secure for United States citizens predictable enforcement by foreign governments of certain arbitral contracts and awards made in this and other signatory nations. *See* 21 U.S.T. 2517, T.I.A.S. 6997, *reprinted following* 9 U.S.C.A. § 201 (West Supp. 1991). To gain rights under the Convention, though, Congress had to guarantee enforcement of arbitral contracts and awards made pursuant to the Convention in the United States courts. *See* Convention Art. XIV ("A Contracting State shall not be entitled to avail itself of the present convention against other Contracting States except to the extent that it is itself bound to apply the Convention."). So Congress promulgated the Convention Act in 1970 to establish procedures for our courts to implement the Convention. 9 U.S.C. § 201, *et seq*.

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[11] We need not here decide whether to apply the policy drafter principle in Underwriters' favor. *Cf.* 1 A. Parks, The Law and Practice of Marine Insurance and Average, 123-24 (insured's broker who prepares slip should be policy offeror).

The Federal Arbitration Act (FAA), 9 U.S.C. § 1, *et seq.*, is the *approximate* domestic equivalent of the Convention; it guarantees enforcement of domestic arbitral contracts and awards, but with slightly different rules of applicability. To avoid possible interference with the well-settled jurisprudence construing the FAA, Congress enacted new legislation in the Convention Act rather than amending the FAA. The Convention Act incorporates the FAA except where the FAA conflicts with the Convention Act's few specific provisions. SENATE COMM. ON FOREIGN RELATIONS, FOREIGN ARBITRAL AWARDS, S. REP. No. 702, 91st Cong., 2d Sess. 5 (1970); 9 U.S.C. § 208.

The parties recognize that this suit concerns an arbitration agreement and is not entirely between United States citizens, so the Convention Act governs this case. 9 U.S.C. § 202. Underwriters removed this case pursuant to the Convention Act:

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been

> brought in the district court to which it is removed.

9 U.S.C. § 205.

Underwriters argue that Congress enacted the last sentence of section 205 to confer on international litigants a nonwaivable right to a federal forum for the resolution of Convention disputes.[12] We disagree. Underwriters focus only on the *part* of section 205's last sentence that says "any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed." Taken out of context, this imperative language seems to preclude remand of cases removed under section 205. But Underwriters reading of section 205 does not account for the introductory phrase

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[12] The district court held that the last sentence of section 205 does not vest exclusive jurisdiction over Convention cases in the federal courts. The court's holding is correct; the language and history of the Convention Act indicate nothing other than Congress' intent to grant federal courts concurrent jurisdiction over Convention cases and defendants a right to remove state-filed Convention cases to federal court. *See* 9 U.S.C. § 203 (federal district courts have "original jurisdiction" over Convention cases); 9 U.S.C. § 205 (removal right); S. REP. No. 702; HOUSE COM. ON THE JUDICIARY, FOREIGN ARBITRAL AWARDS CONVENTION, H. REP. No. 1181, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 3601-04 (never mentioning exclusive federal jurisdiction); *Gulf Offshore Co., Div. of Pool Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478, 101 S.Ct. 2870, 2875 (1981) ("presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests"). But the court's holding as to exclusive jurisdiction did not answer Underwriters' argument.

to the last sentence: "[f]or the purposes of Chapter 1 of this title."

We read the last sentence of section 205 in conjunction with title nine's chapter one, the FAA to perceive the sentence's meaning. The FAA's section 3 provides that "[i]f any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration" and the court concludes that the parties agreed in writing to arbitrate, the court must stay the trial of the action until after arbitration proceedings. 9 U.S.C. § 3. The phrase "courts of the United States" as used in section 3 encompasses only constitutional courts established under Title 28, Chapter 5 of the United States Code. *Jos. L. Muscarelle, Inc. v. American Timber & Trading Co., Inc.*, 404 F.2d 467, 469 (5th Cir. 1968). So Congress incorporated the FAA's section 3 into the Convention Act *and* made it applicable to cases that are brought in state court and removed to federal court under section 205 by statutorily deeming those cases to have been "brought" in federal court.

Had Congress meant to provide defendants in Convention Act cases with an absolute removal right, it would not have qualified section 205's last sentence with "[f]or the purposes of Chapter 1 of this title." Moreover, Congress placed the sentence that Underwriters contend confers a significant and unique removal right at the *end* of section 205, *after* a technical, relatively insignificant rule that "the ground for removal provided in [section 205] need not appear on the face of the complaint but may be shown in the petition for removal." 9 U.S.C. § 205.

Also, there is nothing in the Convention Act's legislative history to suggest that Congress intended to accord a nonwaivable removal right to Convention defendants. Indeed, Ambassador Richard D. Kearney, Chairman of the Secretary of State's Advisory Committee on Private International Law, who explained the Convention Act's operation to the Senate Foreign Relations Committee, testified that the Convention Act only effected "minor changes" in the FAA for Convention cases and that section 205 "take[s] care of certain technical problems arising out of differences between the [FAA] and the convention." S. REP. No. 702 at 5, 7. He also testified that section 205 "clarif[ies] the removal issue [by] provid[ing] a right to remove an action [falling under the Convention]." *Id.* at 7, 10. But neither he nor anyone else whose comments are preserved in the Convention Act's legislative history used the word "absolute" or "nonwaivable" in conjunction with section 205's removal right.

D. THE EXPRESS WAIVER RULE

While neither *Nutmeg* nor section 205 dictates the legal result that obtains from this case's facts, we still find both authorities relevant. Together they suggest that although Congress made it easy for defendants in state-filed Convention cases to remove to federal court, defendants may contractually waive this privilege. That we enforce contractual forfeitures of removal rights, even in international arbitration cases, accords with the Convention's purpose of ensuring that parties to international business transactions can expect courts to enforce their specifications as to how their disputes will be resolved. *See Mitsubishi*, 473 U.S. at 629, 105 S.Ct. at 3355 ("concerns

of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' [arbitration] agreement, even assuming that a contrary result would be forthcoming in a domestic context").

But we still must specify the circumstances under which we will recognize a party's waiver of its Convention Act removal rights. There are four reasons why we will give effect only to explicit waivers of Convention Act removal rights.

1. Reciprocity

Our decision in this case could jeopardize the international arbitration agreements of United States citizens who are not parties to this case. Underwriters and McDermott executed an ambiguous contract and disavowed any expressed intent regarding waiver of Convention Act removal rights. Therefore, we adopt the express waiver rule here to afford maximum protection to all those who rely on the Convention while respecting their freedom to agree upon procedures for resolving their disputes.

If we held that a party could be deemed to have waived its Convention Act removal rights by any legal standard less stringent than our express waiver rule, state courts would rule on more Convention issues. A major reason for the United States' twelve-year hesitancy in ratifying the Convention after it became available for adoption in 1958 was that

> [i]n the courts of a majority of the states of the United States, foreign arbitral agreements [would] not be recognized, stays of conflicting litigation [would] not be granted, and a foreign arbitral award [would] still be unenforceable if the agreement was revoked prior to the handing down of the award.

Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1074 n.108, 1081 (1961). Although a majority of states have abandoned the common law hostility to arbitration,[13] *see* S. EXEC. REP. No. 10, 90th Cong., 2d Sess. 7 (1968) (36 states enforce arbitration agreements), we are not certain that all states have done so or will not revert to the common law view of arbitration in the future. *See, e.g., Sigal v. Three K's, Ltd.*, 456 F.2d 1242, 1243 (3d Cir. 1972) (where Virgin Islands had no arbitration statute, contract's arbitration clause did not bar municipal court action).

We are even more concerned that some states have adopted constitutionally valid arbitration laws that would undermine the Convention Act in proceedings held in the courts of those states. *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 109 S.Ct. 1248 (1989) illustrates this point. In *Volt*, a California trial court applied Cal. Civ. Proc. Code Ann. § 1281.2(c) (West 1982) to stay arbitration proceedings while it resolved a suit between one of the parties to the arbitration dispute and a third

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[13] *See Sedco*, 767 F.2d at 1145 n.12 (common law hostility toward arbitration stems from jurisdictional jealousy).

party.[14] *Volt*, 109 S.Ct. at 1251. The Supreme Court acknowledged that the FAA applied to the arbitration agreement, but held that the FAA's sections 3 and 4 did not conflict with California's section 1281.2(c) because the parties' arbitration agreement specified that it was to be governed by California law. *Id.* at 1254-56. Had the Court not held that the parties agreed to have their contract interpreted under California law, section 1281.2 would conflict with this court's interpretation of the FAA's sections 3 and 4. *See Sedco*, 767 F.2d at 1148-50 (district court erroneously refused to stay litigation and compel arbitration although third party joined suit between parties to arbitration agreement).

Volt is instructive here because the Court found "some merit" in the argument that sections 3 and 4 of the FAA do not apply to state court proceedings, and noted that the Court has

> never held that [the FAA's] §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, see 9 U.S.C. § 3 (referring to proceedings "brought in any of the courts of the United States"); § 4 (referring to "any United States district court"), are nonetheless applicable in state court. See *Southland Corp. v. Keating*, [465 U.S.] at 16, n. 10, 104 S.Ct., at 861 n. 10 (expressly reserving the question whether "§§ 3 and 4 of the Arbitration Act apply to proceedings in state courts"); see also *id.*, at 29, 104

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[14] The California court stayed arbitration to avoid the risk of conflicting rulings on common issues of fact between the arbitration proceeding and the state court action.

> S.Ct., at 867 (O'CONNOR, J., dissenting) (§§ 3 and 4 of the FAA apply only in federal court).

Id. at 1254 & n.6; *but see id.* at 1256 n.2 (BRENNAN, J., dissenting) (citing statement in *Moses H. Cone*, 460 U.S. at 26 nn.34-35, 103 S.Ct. at 942 nn.34-35 that "state courts, as much as federal courts, are obliged to grant stays of litigation under § 3 of the Arbitration Act;" arguing that California trial court's stay of arbitration conflicts with specific enforcement of arbitration agreements guaranteed by FAA § 2). We conclude from the Supreme Court's opinions that state courts do not necessarily have to grant stays of conflicting litigation or compel arbitration in compliance with the FAA's sections 3 and 4. *See also Moses H. Cone*, 460 U.S. at 27 n.36, 103 S.Ct. at 942-43 n.36 (before 1981, there was "considerable doubt" whether North Carolina courts would grant a section 3 stay of litigation over a construction contract); *Jos. L. Muscarelle, Inc.*, 404 F.2d at 469 (only constitutional courts established by Title 28, Chapter 5 obliged to enforce FAA section 3); *but see Econo-Car Int'l Inc. v. Antilles Car Rentals, Inc.*, 499 F.2d 1391, 1393 (3d Cir. 1974) (despite *Muscarelle*, strong federal policy favoring enforcement of arbitration agreements suggests that Congress wanted federal district court for Virgin Islands to apply FAA).[15]

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[15] The *Econo-Car* court explained the consequences of the FAA not applying to state courts:

> a party may well defeat any attempt specifically to enforce an agreement to arbitrate in the [state court] since the party seeking arbitration would then be remitted to local law. There [would then be no arbitration where there] is no [state] statute providing for specific enforcement of arbitration agreements,

Because the Convention Act virtually incorporates the FAA, *see* 9 U.S.C. § 208, state courts do not necessarily have to stay litigation or compel arbitration under the Convention Act either.[16]

States could also employ purely procedural mechanisms to undermine federal accession to the Convention. A state hostile to arbitration could force parties to endure litigation before permitting review of a trial court's arbitrability decisions. *See, e.g., General Elec. Supply Co. v. Warden Elec., Inc.*, 38 Ohio St. 3d 378, 528 N.E.2d 195, 198 (1988) (disavowing hostility to arbitration while holding "that an order of a trial court which denies a stay of litigation pending arbitration and grants a motion to dismiss the arbitration between parties that have contracted

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> [because] at common law such agreements are not specifically enforceable.

Id. at 1392 n.2.

[16] The Convention Act has its own arbitration compulsion provision:

> A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. . . .

9 U.S.C. § 206. But the only courts "having jurisdiction under [the Convention Act]" are federal. *See* 9 U.S.C. § 203 (district courts have original jurisdiction of Convention cases); *see also* 115 Cong. Rec. 40141 (1970) ("Section 206 permits a court to direct that arbitration be held at the place provided for in the arbitration agreement. Since there may be circumstances in which it would be highly desirable to direct arbitration within the district in which the action is brought and inappropriate to direct arbitration abroad, section 206 is permissive. . . . "). So section 206, like the FAA's section 4, arguably confers no authority on state courts to compel arbitration.

to arbitrate is not a final, appealable order"). A federal district court's order refusing to enforce an arbitration agreement is immediately appealable. *Sedco*, 767 F.2d at 1149.

If state courts refuse to promptly enforce arbitration agreements in Convention cases, other signatory nations could cite the Convention's reciprocity clause to justify departing from the Convention in cases involving citizens of states with recalcitrant courts. *See Quigley, supra*, 70 YALE L.J. at 1081-82. Our express waiver rule minimizes this danger by providing a bright-line standard for determining when parties surrender the full panoply of Convention Act rights. Because the Convention only permits other countries to reciprocally abrogate Convention convenants "to the extent" that our nation does, anomalous state court Convention decisions could only be raised against our citizens when they have expressly waived their Convention rights. *See* Convention Art. XIV.

2. *Uniformity*

As the Delta court recognized, a restrictive construction of a district court's authority to remand certain types of cases fosters uniformity in that area of law. In *Delta*, Kentucky's Insurance Commissioner (the Commissioner) brought a state-court action against several reinsurers, including Banco de Seguros del Estado (Seguros). 900 F.2d at 891. Seguros, a foreign-state-owned company, qualified as a foreign sovereign under the Foreign Sovereign Immunity Act (FSIA), 28 U.S.C. § 1603. Seguros exercised its FSIA right to remove the case to federal

court. *See* 28 U.S.C. § 1441(d). The Commissioner challenged Seguros' removal because Seguros executed an agreement that included a service-of-suit clause with terms identical to the clause at issue here. 900 F.2d at 891-92. The *Delta* court reversed the district court's remand, refusing to find a waiver of FSIA removal rights absent an "explicit" waiver of those rights. 900 F.2d at 894. The court concluded that the FSIA's purpose would best be served by "the development of a uniform body of [FSIA] law," and that uniformity is best served by trying all FSIA cases in federal court unless the parties unequivocally choose otherwise. *Id.*

We find this reasoning persuasive and applicable to Convention Act cases.

> The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to . . . unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15, 94 S.Ct. 2449, 2457 (1974); *see also I.T.A.D. Associates, Inc. v. Podar Bros.*, 636 F.2d 75, 77 (4th Cir. 1981) (Convention interpretation "must not only observe the strong policy favoring arbitration, but must also foster the adoption of standards which can be uniformly applied on an international scale").

McDermott argues that the district court's remand does not compromise Convention Act uniformity because state courts must abide by the Convention Act. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 637 F.2d 391, 395 (5th Cir. Unit B 1981) ("state court is bound to apply

the [FAA] if the statutory requisites are present"); *Corcoran*, 842 F.2d at 35 (state court must follow Convention Act). We disagree. Disunity is directly proportional to the number of authorities speaking on any subject. Institutional review procedure for state-court judgments also fosters disunity. At its discretion, the Supreme Court may review only final judgments or decrees of the highest court of a state in which a state trial court's Convention decision could be reviewed. *See* 28 U.S.C. § 1257; SUP. CT. R. 10.1.(b)-(c). By contrast, federal-district-court Convention decisions are appealable of right to a court of appeals, ensuring uniformity of federal decisions at least on a multi-state basis. *See* FED. R. APP. P. 3.

Desiring a unitary FSIA jurisprudence, " 'Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts. . . . ' " *Proyecfin*, 760 F.2d at 396-97 (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983)). Similarities between the removal statutes in the FSIA and the Convention Act indicate that Congress also sought unity by channelling Convention Act cases into federal courts. *Compare* 9 U.S.C. § 205 *with* 28 U.S.C. § 1441(d). Both statutes permit removal based on the foreign domicile of a defendant, regardless of the questions raised by the case or the amount in controversy. Under section 1441(d), a defendant may remove "at any time for cause shown," and under section 205, a defendant may remove "at any time before the trial." Other cases may be removed only within 30 days after the defendant receives a pleading. *See* 28 U.S.C. § 1446(b).

3. Precedent

Even in cases that do not involve the Convention or the FSIA, many federal courts have refused to find a contractual waiver of removal rights absent a "clear and unequivocal" expression of intent to waive those rights. *Regis*, 894 F.2d at 195; *Weltman v. Silna*, 879 F.2d 425, 427 (8th Cir. 1989); *Links Design, Inc. v. Lahr*, 731 F. Supp. 1535, 1536 (M.D. Fla. 1990); *John's Insulation, Inc. v. Siska Constr. Co., Inc.*, 671 F. Supp. 289, 294 (S.D.N.Y. 1987); *Morgan Dallas Corp. v. Orleans Parish School Board*, 302 F. Supp. 1208, 1209 (E.D. La. 1969); *accord* J. MOORE & B. RINGLE, 1A MOORE'S FEDERAL PRACTICE ¶ 0.157[9] at 152; *but see General Phoenix Corp. v. Malyon*, 88 F. Supp. 502, 503 (S.D.N.Y. 1949) (recognizing possibility that service-of-suit clause only waived objections to personal jurisdiction, but interpreting contract to waive removal rights). *Nutmeg* is also conceptually consistent with the "unequivocal expression rule" because the court premised its decision on its belief that the only possible significance of that case's forum selection clause was to waive removal rights. 931 F.2d at 15-16; *see also Keaty*, 503 F.2d at 956-57 (no waiver of removal rights where forum selection clause does not "on its face, clearly limit[] actions thereunder to the courts of a specified locale" and party seeking remand drafted clause).

The *Foster* court criticizes all of these authorities as inconsistent with "the fact that for 'approximately five score years' the federal courts 'have construed the removal statutes *strictly* and, on the whole, *against* the right of removal.'" 933 F.2d at 1217-18 n.15 (quoting Moore's ¶ 0.157 [1.-3] at 38 (emphasis added)). But the court's criticism cannot apply to FSIA or Convention Act

cases because in these instances, Congress created special removal rights to channel cases into federal court. *See id.* (distinguishing *Delta* because the Sixth Circuit "was primarily driven by considerations peculiar to the FSIA" in adopting the express waiver rule); *see also Butler v. Polk*, 592 F.2d 1293, 1296 (5th Cir. 1979) (refusing to find error in removal procedure while recognizing that "ambiguities are generally construed against removal"); *compare* 14A CHARLES A. WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3721 at 223 (2d ed. 1985) (finding "persuasive" cases construing service-of-suit clause as a waiver of removal rights) *with id.* § 3729 at 487 ("a federal court probably would consider the congressional objective of keeping the federal courts open to foreign states to be paramount and therefore accept jurisdiction" despite express waiver of removal rights).

4. *Speed*

Where parties have executed valid arbitration agreements, judicial enforcement of arbitration agreements and awards ought to be "summary and speedy" out of respect for the parties' bargain to keep their disputes out of court. *See Moses H. Cone*, 460 U.S. at 27; 103 S.Ct. at 943; *see also Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 335 (5th Cir. 1976) (consistent with Convention purpose, Convention Act prescribes summary procedure to expedite petitions for confirmation of foreign arbitral awards). Future forum choice disputes in Convention cases will not languish in this court under our bright-line express waiver rule. *See Delta*, 900 F.2d at 894 (express

waiver rule necessary "to provide maximum guidance for future cases").

IV. CONCLUSION

We VACATE the Remand Order and return the case to the district court.

BUSINESS INSURANCE
June 15, 1992

* * *

Louisiana seeks to Modify policies used by Lloyd's

BATON ROUGE, La.-Louisiana Insurance Commissioner Jim Brown is suing to change the way Lloyd's of London syndicates do business in his state.

The commissioner earlier this month filed suit in U.S. District Court in New Orleans seeking a declaratory judgment that would prevent Lloyd's syndicates from including mandatory arbitration clauses in their Louisiana policies.

While the Louisiana Insurance code prohibits the clauses, Lloyd's syndicates, as alien insurers, do not fall under the state's regulatory authority.

A declaratory judgment prohibiting the clauses in contracts written by Lloyd's syndicates would give the commissioner some authority over the syndicates. It would also give policy-holders access to U.S. courts for disputes with underwriters.

"This was the only thing to do if we were going to protect the Louisiana policyholder's right to sue," said Mr. Brown. "This ability of alien companies to be able to include arbitration clauses also gives them an unfair advantage over other companies that do business here but by law cannot gain the same benefits because their use of arbitration clauses is prohibited."

The Louisiana Department of Insurance may widen its attempt to regulate alien insurers by seeking declaratory judgments against other underwriters that use the clauses, according to Claire Lemoine, a staff attorney with the department.

Ms. Lemoine said the department could eventually seek legislation that would outlaw the practice by all alien insurers.

NATIONAL UNDERWRITER

Property & Casualty/Risk & Benefits
Management Edition
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Fed. Judge Says McCarran Does Not Apply To Lloyd's

By Louisiana Correspondent

A federal judge in New Orleans has ruled that the McCarran-Ferguson Act does not apply to foreign commerce and as a result has ordered a Louisiana company to arbitrate its claim for losses with its Lloyd's of London underwriters, despite a state law prohibiting arbitration.

The decision by Judge A.J. McNamara in U.S. District Court for the Eastern division of Louisiana was made in a lawsuit McDermott International Inc. first filed against its underwriters in 1990.

The New Orleans energy services company sued after its underwriters, represented by John Richard

Ludbrooks Youell, demanded arbitration to determine McDermott's claim.

McDermott sued for damages, arguing that *Act* 629 of Louisiana's Insurance Code prohibited arbitration. The company filed a second suit in early February seeking a declaratory judgment on the issue of arbitration.

On Feb. 14, Judge McNamara denied McDermott's motion for summary judgment and ordered that the company and its underwriters submit to arbitration.

Judge McNamara held that McCarran-Ferguson was inapplicable in the case because the federal act "does not apply to contracts made under the [Convention on the Recognition and Enforcement of Foreign Arbitral Awards], as it was intended to apply only to interstate commerce, not to foreign commerce."

Accordingly, the court found that federal arbitration law, not Louisiana law, is applicable to the case.

"To the extent that Louisiana law prohibits agreements to arbitrate in the context of insurance agreements, federal law favoring arbitration preempts it," the judge added.

Judge McNamara's decision sent the Louisiana Insurance Department scrambling to intervene in the lawsuit.

On May 19, Judge McNamara refused Commissioner Brown's request to intervene, saying McDermott was representing the interests of the state as well as its own interests. But he did allow interested parties to file friend-of-the-court arguments making their positions part of the legal record.

Although the National Association of Insurance Commissioners, based in Kansas City, Mo., is not a party to the suit, the NAIC, along with the Louisiana Insurance Department, filed position statements as friends-of-the-court.

"This ruling, if not modified, could seriously undermine the authority of state insurance commissioners to administer and enforce the insurance laws of their states as they relate to the insurance activities of foreign-based insurance companies doing business in their respective states," wrote NAIC attorney Robert Corn in the association's statement.

The NAIC statement said Judge McNamara's declaration "would gut a significant portion" of state insurance law.

"It is simply not in accord with McCarran-Ferguson jurisprudence to declare state laws regulating the business of insurance dead when they come up against an alien insurer transacting the business of insurance in a state," said the NAIC.

After Judge McNamara refused to allow the Louisiana Insurance Department to intervene as a party in the McDermott litigation, Commissioner Brown filed a lawsuit of his own on June 4.

The commissioner seeks a declaratory judgment spelling out his right to regulate alien underwriters.

If the ruling stands, "then it will allow alien insurers immunity from state regulation by the mere insertion of arbitration clauses in insurance contracts, while domestic

insurers do not enjoy such privileges," the commissioner argued in his suit.

Such "favoritism," the suit said, "would lead to unfair trade practices and disadvantage domestic insurers" by subjecting only them to state court jurisdiction while allowing their alien counterparts to escape regulation.

"If the commissioner is not allowed to enforce the laws upon all insurers that are transacting business within the state, consistent administration and regulation of the code cannot be assured," said department attorney Claire Lemoine.